Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

Sylvia Dean,
Petitioner,

VS.

Computer Sciences Corporation,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. **DOES TITLE VII PROHIBIT DISCRIMINATION AGAINST EMPLOYEES WHO COMPLAIN ABOUT DISCRIMINATORY PRACTICES IN "BURDEN SHIFTING" OR "MIXED MOTIVES" CASES?**

A. Whether a refuted proffered reason for adverse action where employer offers no investigation into employee's claims is sufficient to grant summary judgment?

B. Whether the law requires a detailed documenting of race, gender or sex to establish discrimination and without such documentation can it cause failure of the prima facie test in discrimination and can that failure be combined with the prima facie test in retaliation to fail both claims?

II. **DOES THE ANTI-RETALIATION PROVISION OF SECTION 704(A) OF TITLE VII OF THE 1964 CIVIL RIGHTS ACT PROTECT EMPLOYEE'S FROM FAILURE OF CAUSAL CONNECTION REQUIREMENT WHEN THE TEMPORAL PROXIMITY REQUIREMENT IS NOT EVALUATED AND IS IN CONFLICT?**

A. Whether the standard of review, taken petitioner's evidence as a whole under

summary judgment evidence requirement, was sufficient to provide a basis for a claim of retaliation under Title VII of the Civil Rights Act of 1964, 42.S.C. 2000e et seq.?

B. Whether petitioner failed to establish a causal connection between his protected activity and the challenged performance evaluation?

PARTIES

The parties to this action are set forth in the caption

TABLE OF CONTENTS

QUESTION PRESENTED..... i
PARTIES i
TABLE OF CONTENTS..... iii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 8
OPINIONS BELOW 8
STATEMENT OF JURISDICTION 8
STATUTORY PROVISION INVOLVED 8
STATEMENT OF THE FACTS 10
STATEMENT OF THE CASE 12
REASONS FOR GRANTING THE WRIT 16

I. THIS CASE PRESENTS AN ISSUE OF VITAL IMPORTANCE TO THE ADMINISTRATON OF TITLE VII 16

II. THE DECISION OF THE TENTH CIRCUIT COURTS ON IMPORTANT FEDERAL QUESTIONS AND IMPORTANT MATTERS CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT OF OTHER COURTS..... 23

III. THERE REMAINS AN ACKNOWLEDGED SPLIT AMONG THE CIRCUITS ON THE PRIMA FACIE CASE OF RETALIATION CLAIM WHEN APPLYING TIMING (TEMPORAL PROXIMITY) AND KNOWLEDGE AND IS THAT TEMPORAL PROXIMITY, ALONE, SUFFICIENT..... 27

DISCUSSION..... 36
CONCLUSION 43

APPENDIX

Appendix A - Opinion of the United States Court of Appeals for the Tenth Circuit, June 30, 2010 1

Appendix B - Opinion of the United States District Court for the State of Colorado, May 19, 2009 2

Appendix C - Opinion of the United States District Court for the State of Colorado, May 19, 2009.....3

Appendix D - Recommendation of the United States District Court Magistrate Judge for the State of Colorado, February 25, 2009 4

TABLE OF AUTHORITIES

Cases

Piercy v. Maketa, 480 F.3d 1192, 1198 (10th Cir. 2007); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1177 (10th Cir. 1999).....13

Quinn v. Green Tree.....13

Piercy v. Maketa, 480 F.3d 1192, 1198 (10th Cir. 2007); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1177 (10th Cir. 1999 13

Hysten v. Burlington Northern & Santa Fe Ry., 296 F.3d 1177, 1183-84 (10th Cir. 2002).....13 18

Burlington Northern & Santa Fe Railroad Co. v. White, 126 S. Ct. 2405.....13/17

Petersen v. Utah Dep't of Corr., 301 F.3d 1182, 1188 (10th Cir. 2002).....14

Holland, 883 F.2d at 1314; see also Jennings, 796 F.2d at 967. 14

EEOC v. Flasher Co., Inc., 986 F.2d 1312, 1316 (10th Cir.1992). 14

196 F3d 1354 Damon v. Fleming Supermarkets of Florida Inc.....15

Alphin, 940 F.2d at 1501 n. 1 (citing Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir.1982).....15

Komel v. Jewel Cos., 874 F.2d 472, 474-75 (7th Cir.1989.....17

Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1507 (5th Cir.1988) (same); see also Shager, 913 F.2d at 400-01.....17

Dale, 797 F.2d at 464.....17

Haynes v. Level 3 Communications, LLC, 456 F.3d 1215, 1228 (10th Cir. 2006); Argo v. Blue Cross &

Blue Shield of Kan., Inc., 452 F.3d 1193, 1198 (10th Cir.2006.....17

See Holland, 883 F.2d at 1315; Collins, 830 F.2d at 702; see also Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir.1982).....17

See Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 142 (2000) 18

Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).....18

Gupta v. Fl. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000); [*6] Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004 .....18/19

Cifra v. General Electric Co.....19

Strother v. Southern California Permanente Medical Group.....19

Clark County School District v. Breeden 19

Holava-Brown v. General Electric Co.....21

McDonnell Douglas Corp. v. Green, ...22

Farrell v. Planters Lifesavers Co 22

Dey v.Colt Construction & Development Company

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 98 FEP 571 (10th Cir. 2006)

Statutes

28 U.S.C. § 1254(1)..... 1

42 U.S.C. § 2000e-3 (Section 704(a) of Title VII of the 1964

Civil Rights Act)..... passim

Title VII of the 1964 Civil Rights Act .....passim

Other

CAUSATION IN RETALIATION CLAIMS: CONFLICT BETWEEN THE PRIMA FACIE CASE

AND THE PLAINTIFF'S ULTIMATE BURDEN OF PRETEXT

http://lawreview.wustl.edu/inprint/81-1/p151%20Gertken.pdf

WEIGHING TEMPORAL PROXIMITY IN TITLE VII RETALIATION CLAIMS

http://www.bc.edu/bc_org/avp/law/lwsch/journals/bclawr/43_3/04_TXT.htm

GARLAND'S DIGEST ON EMPLOYMENT DISCRIMINATION LAW

http://www.garlands-digest.com/treatise/20/2053110.html

http://www.garlands-digest.com/treatise/20/20511.html

EEOC

http://www.eeoc.gov

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sylvia Dean respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on June 30, 2010.

OPINIONS BELOW

The June 30, 2010, opinion of the court of appeals is set out at pp. 3a-10a of the Appendix A.

The May 19, 2009, opinion of the district court is set out at pp. 12a-17a of the Appendix B and C.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on June 30, 2010.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT

FACTS

Petitioner, Sylvia Dean, Proceeding Pro Se, was the only black female in the CMAC and an employee of CSC who began employment with Defendant in March of 2004 under the Management of Jon Schreiber. In December 2004, Ken O'Neil became Petitioners Manager. Petitioner requested a promised pay increase by Schreiber of O'Neil. This pay inquiry was prompted by the fact that the Petitioner had been in her position long enough to warrant the increase and Petitioner had received word of another position she could receive at the approval of O'Neil. It was then when O'Neil introduced not poor performance, but average performance as not to allow a pay raise. O'Neil then disapproved of the Petitioners moving into the new position stating undocumented policy that employees could not switch between companies in the same position of which other employees were allowed to do. It should be noted that Triplett (Caucasian, Female) the harasser was given said position. Petitioner thoroughly took note of this and other unfair treatment and in October 5 2005 she felt it necessary to express complaints to immediate supervisor, Dave Stroup, who acknowledged no performance problems, but took no action on Petitioners claims. In December of 2005, When Petitioner made an effort to avoid harm and tell harassers to stop, harassers retaliated by making alleged non-witnessed complaints to O'Neil of which she refuted as well as stating that similarly situated employees of other race were allowed to sleep. O'Neil followed this with an email to the staff that this was not appropriate policy to

sleep in an effort to cover up what was being allowed by white male employees of which Petitioner mentioned O'Neil also emailed Petitioner the policies for which he felt she was in violation with and Petitioner responded to that email with her initial complaints made to Stroup to document O'Neil had knowledge of complaints. Petitioner notes that O'Neil took no action directed at Harassers. It was then rumored that O'Neil was pursuing another violation of policy against Petitioner. At this point Petitioner felt it necessary to formally open a complaint with a CSC company EEO official in her favor (Bill Smith) because complaints were not being handled and only causing more hostility.

She confided in Smith the details of her complaint via phone and responded with and email at Smiths request where she did mention race and gender. In a Feb 9th Meeting with O'Neil in which he preceded to Counsel Petitioner on alleged performance issues it was argued and admitted by O'Neil that Triplett and Johnson had made alleged complaints, however, Petitioners complaints were not heard. The meeting ended with no issuing of the formal letter of caution as Petitioner had refuted the alleged performance issues, However, O'Neil warned Dean not to make any more complaints of Harassers in direct violation of Title VII. On Feb 10th the Petitioner, for lack of investigation, voiced complaints to Harassers individual Managers as they had been allowed to do so to her. With no infractions of performance from the time of the Feb 9th meeting, O'Neil decided to issue letter of Caution. An email from Petitioner questioning why the Letter was issued resulted in the response by O'Neil:

When we spoke, I did in fact mention that I was going to give you one more chance and refrain from issuing the letter. We agreed that sleeping on the job, and failure to complete your timecard on a daily basis was between you and me and not others within the work center. The day following our meeting, you issue two complaints against personnel in these work centers in an effort to divert attention from your problem. Since you violated our agreement, I chose to issue the letter.

On Feb 15th Petitioner, in email , refused to sign letter of caution and made an attempt to contact Bill Smith (Petitioner EEOC Rep) who stated that he was no longer handling her complaint and that it would be forwarded to Swerline (O'Neil's HR Rep against Petitioner). Petitioner believed this to be a direct conflict of interest. On Feb 16th only hours later, O'Neil attend an Operations meeting in which all managers attend, which would include the Harassers managers as well. It was then decided that Petitioner was to be removed from the contract. Petitioner was terminated on February 23rd.

CASE

PETITIONER Sylvia Dean ('Petitioner'), an African-American Female, alleged that her employer discriminated against her because of race, gender, color, and sex and she timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which conducted an investigation and issued Petitioner a right-to-sue letter. Within ninety

days of receiving the letter, Petitioner timely filed a pro se complaint against Computer Sciences Corporation, alleging race, gender, color, sex, and other discrimination being retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and 42 U.S.C. § 1981.

Magistrate Judge Tafoya Granted in Part and Denied in Part Motion for Summary Judgment, Recommending that the discrimination and hostile work environment claims be dismissed. Citing Appendix D page 25 and 26.

a. Discrimination

This court again agrees with the defendant that Petitioner has submitted nothing to establish a genuine issue of material fact that the basis for her termination of employment was pretextual. In fact, undisputed documents and facts show that Petitioner was subject to dismissal for violations of company policy and her own poor job performance.

b. Hostile Work Environment

No evidence that the CSC workplace was permeated with 'discriminatory intimidation, ridicule, and insult,' at all, much less that rose to the level of an abusive working environment.

And that the retaliation claim is allowed to proceed to trail. Citing Appendix D page 28.

c. Retaliation

Petitioner did engage in protected activity when she filed complaints against Johnson and Triplett on February 9, 2006. The fact that she filed the complaints against these non-CSC employees was the self-admitted reason O'Neil issued the Letter of Caution. Even though this court finds that

based on the evidence in the case there is no genuine issue of material fact in dispute that would lend a reasonable person to conclude that Petitioner's termination was based on either her race, gender or color, it remains in dispute whether her actual termination in February, 2006, came as a result of her performance issues or because she angered O'Neil by engaging in protected activity. The causal connection between Petitioners' protected activity of filing complaints alleging discrimination against Johnson, Triplett and O'Neil and her termination from employment by CSC at that particular moment in time remains a dispute which cannot be resolved on summary judgment, but rather remains a genuine issue for trial.

The District Court Judge Brimmer Accepted Magistrate Judge Recommendation in part, on dismissal of:

a. Discrimination and Hostile Work Environment Claims

Based on this review, conclusion is that it is a correct application of the facts and the law.

And Overruling Magistrate Judge Recommendation in part, on Retaliation

b. Retaliation Claim

Court finds that Petitioner has not made prima facie claim of having engaged in protected opposition to discrimination and unnecessary to review defendants other objections to the Recommendation and Dismissed Petitioner , Claims. Citing Appendix B.

Petitioner filed Motion for Reconsideration and Motion for Relief which was denied.

Petitioner filed Notice of Appeal and Order and Judgment Affirmed District Court on June 30, 2010. Citing Appendix A.

Court finds that Petitioner could not establish causal connection.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF VITAL IMPORTANCE TO THE ADMINISTRATION OF TITLE VII.

The Tenth Circuit in this case held that Title VII Discrimination does not protect an employee who makes complaints without employer's internal investigation about racial, gender or sex harassment. Specifically, the court of appeals held that statements which are not documented and of which do not mention race, gender or sex by Petitioner even without investigation are not protected.

The Tenth Circuit in this case held that Title VII Discrimination does not protect an employee against a Hostile Work Environment. Specifically, the court held that statements consistently offensive and abusive and harassing in nature are not protected.

The Tenth Circuit in this case held that the anti-retaliation provisions in section 704(a) of Title VII do not protect an employee who complains about harassment. Specifically, the court of appeals held that a written statement by employer that introduces knowledge and falls within "very close" timing of a protected activity was not sufficient evidence and therefore fails the causal element of the prima facie case of retaliation.

DISCRIMINATION

In holding that the record contained insufficient evidence to cause inference or raise pretext, the

Court of Appeals misapplied the standard of review dictated by Rule 50. The court disregarded critical evidence favorable to supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. See Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000)

There was evidence that O'Neil had "papered" her personnel file with negative reports, including two written reprimands. These are the kind of serious employment consequences that adversely affected or undermined Dean's position. The context of this papering should matter when it was used by Defendants to provide a proffered reason for the termination Dean. It is clear that CSC's stated non-discriminatory motives to terminate Dean were all based on non witnessed allegations by harassers to O'Neil of which O'Neil chose to investigate and take action on in an effort to paper up CSC's case. Had O'Neil not consciously given credence and effect to Harasser's comments about Petitioner then clearly we have a "Mixed Motives" case where no evidence of poor performance would be present to rebut the race and gender based discrimination/harassment that Petitioner endured. CSC's decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision. Under *Price Waterhouse*, if a Title VII plaintiff shows that an impermissible consideration was a "motivating factor" for the adverse action, the burden of proof

shifts to the defendant, who, to escape liability, must then show that the same action would have been taken regardless of the impermissible consideration. In "mixed-motive" cases (cases where it is shown that both legitimate and illegitimate considerations motivated an employer's conduct), the United States Supreme Court has held that the employee may meet his/her burden by presenting circumstantial evidence of the employer's pretext. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

In **FACT**, there were no occurrences of incidences outlined in the Letter of Caution that occurred between the February 9th meeting, with Petitioner and O'Neil, and her Termination of February 23rd that would have warranted the issuance of the Letter of Caution, the Client requesting removal of Petitioner or Petitioner Termination, except for the Fact the she filed the Complaints, in which O'Neil admittedly acknowledged was his reason for issuing the Letter of Caution. Showing clearly that O'Neil had knowledge and that along with the evidence of temporal proximity is well within the limits to survive a summary judgment.

In **FACT**, Petitioner provided a detailed refutation of events which underlie the employer's negative performance assessment demonstrating that the employer may not have honestly relied on the identified deficiencies in making its decision.

Although Magistrate Judge says Petitioner was aware of Performance issue as early as Dec 2004

these performance problems were self admitted by O'Neil to be not an issue but average performance.

In **FACT**, these were "adverse employment actions" in retaliation for and initiated by Petitioner when she requested a pay increase, job change, shift change or commented on unfair treatment, harassment or discrimination. Furthermore, the harassment and discrimination Petitioner received interfered with her performance as Petitioner stated.

Title VII discrimination claims series of employment decisions that, taken together, constitute adverse employment action:

Unfounded charges of performance issues when Petitioner asked for pay increase. Unfounded policy on transfers within companies on the same contract and not being allowed to, when Petitioner asked for Job Change. Unfounded charges of performance issues when Petitioner opposed to termination of Betty. Unfounded charges of performance issues when Petitioner participated in Shift Change Survey. HR policy violation issuance when Petitioner complained of harassment and discrimination. Letter of Caution issuance when Petitioner complained of harassment and discrimination combined with suggesting the filling EEOC charge. Defendant's Termination of her on February 23, 2006.

Even though Petitioner received HR Policy violation and Letter of Caution, Defendants provided no evidence of actual written complaint of poor performance, and actually the complaints that

prompted the disciplinary actions mentioned above, were alleged, non-witnessed verbal comments and hearsay to O'Neil by harassers, Triplett and Johnson. With respect to Petitioner, Defendants contends that Petitioner was terminated for poor performance; specifically, that over a two year period she received two documented violations, although these documented violations were based on alleged, non-witnessed comments. Petitioner showed denial of these allegations by refusing to sign violations, and has adduced sufficient evidence to create a genuine dispute of material fact as to her job performance. In addition to the circumstantial evidence, Petitioner offers evidentiary support by which a reasonable jury could conclude that the specific reasons for termination given by O'Neil were a pretext.

Authorities

See Komel v. Jewel Cos., 874 F.2d 472, 474-75 (7th Cir.1989) ("an employee's denial of specific events which form the basis of the employer's evaluation may be sufficient to create a genuine issue of fact"); *Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1507 (5th Cir.1988) (same); see also Shager, 913 F.2d at 400-01* (plaintiff discharged for allegedly deficient performance survives summary judgment by showing that performance deficiencies were greatly exaggerated and that any deficiencies were offset by superior sales figures); *Dale, 797 F.2d at 464* (employee must refute employer's specific explanations of inadequate job performance).

In conclusion, Petitioner notes that the circumstantial evidence presented by Petitioner, taken as a whole, is sufficient to make a prima facie showing of race and gender discrimination, and to rebut the nondiscriminatory reasons proffered by Defendant for her termination. Material facts remain in dispute, precluding summary judgment. Accordingly, the court should reverse the district court's order of summary judgment and remand the case for further proceedings before a jury consistent with these findings. All Petitioners communications, particularly when coupled with her previous oral statements to Mr. Smith and her allusion to color- and sex-based harassment in her February 17 email to Mr. Swerline, may also have been sufficient to qualify as protected opposition to racial and sex based discrimination and retaliation.

HOSTILE WORK ENVIRONMENT

In Defendants and Courts view, Petitioners claim is limited to only a small number of specific incidents of alleged harassment over a two-and-a-half year period, and the company therefore argues that those relatively isolated incidents were neither severe nor pervasive enough to establish a hostile and abusive work environment under Title VII. Although the case would certainly be stronger if there were more incidents, what is evident is that it supports Petitioners charge that the conduct was consistently offensive and abusive and harassing in nature. The credibility of that charge can only be assessed once

the fact finder hears Petitioner's testimony along with all the other evidence.

Petitioner disagrees with the district court's conclusion that she has failed to establish a subjectively hostile work environment as a matter of law. Petitioner indicated in her deposition that the conduct made her feel uncomfortable and hampered her performance and she maintained that on more than one occasion. Although she tolerated the conduct for over two years because she feared for her job, Petitioner also indicated that she just wanted it to stop.

Authorities

In Pennsylvania State Police v. Suders, 124 S.Ct. 2342, 2354 (2004), the Supreme court explained that the defendant bears the burden of showing that the victim unreasonably failed to take available steps to reduce the harm.

In Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998), the Supreme Court announced the following rule for vicarious liability for the harassment by a supervisor, which differentiates between cases where a tangible employment action occurred and cases where no tangible employment action occurred:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a

defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Petitioner concludes the evidence, taken as a whole, shows that no action was taken on her claims and she thoroughly followed the process to prevent harm.

II. THE DECISION OF THE TENTH CIRCUIT COURTS ON IMPORTANT FEDERAL QUESTIONS AND IMPORTANT MATTERS CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT OF OTHER COURTS.

RETALIATION

The Supreme Court created the McDonnell Douglas framework in response to a motion for summary judgment. A plaintiff can defeat a defendant's motion for summary judgment by providing a sufficient circumstantial case to pass all three levels of the McDonnell Douglas framework. This burden-shifting framework has also been applied to motions under Rule 50. *See Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 142 (2000).* The Court in Reeves

discussed employment discrimination in the context of a Rule 50 motion for judgment as a matter of law.

Magistrate Judge States: plaintiff meets her prima facie burden of retaliation.

District court Judge Brimmer states: Petitioner did not meet her prima facie burden of retaliation on the second element, the Protected Activity.

Appeals court states: Petitioner did not meet her prima facie burden of retaliation on the third element, the Causal Link.

The Supreme Court in Burlington Northern and Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006), the court explained: We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.

In **FACT**, All courts concluded that the first prong had been met, the second prong was in question by the District court Judge Brimmer and the third prong had been met by Magistrate Judge, However the Appeals Court questioned the Causal Link in which the Magistrate Judge uses temporal proximity to establish an inference of retaliation.

In **FACT**, The temporal evidence provided here is a one week interval between the protected speech and an adverse action; this alone is enough to establish an inference of retaliation. As noted herein, Petitioner is entitled to a presumption of causal connection if there is sufficient temporal proximity

between the adverse action and the protected behavior.

The District Court Judge Brimmer's and the United States Court of Appeals failed to review and consider the obvious and relevant facts/arguments in this case as well as the opinions and views of the other courts.

Authorities

To succeed on a claim of retaliation a plaintiff must show: "(1) that [s]he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Haynes v. Level 3 Communications, LLC, 456 F.3d 1215, 1228 (10th Cir. 2006); Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1198 (10th Cir.2006) (citing Burlington N. & Santa Fe Ry. Co. v. White, — U.S. — , 126 S. Ct. 2405 (2006).*

"A retaliatory motive may be inferred when an adverse action closely follows protected activity. Temporal proximity allows for a presumption of causation in the prima facie setting. *Hysten v. Burlington Northern & Santa Fe Ry., 296 F.3d 1177, 1183-84 (10th Cir. 2002).*

In *Cifra v. General Electric Co.*, the court held temporal proximity sufficient to establish a prima facie causal connection. Although the record contained no other evidence of a causal connection, the court held that a rational fact-finder could find a

causal connection based solely on the temporal proximity evidence, and therefore, could find the defendant liable for retaliation.

In 2001, in *Clark County School District v. Breeden*, the Supreme Court cemented the areas of general agreement among lower courts on temporal proximity. The Court held that very close temporal proximity alone could be sufficient evidence for a prima facie causal connection. In *Clark County School District v. Breeden*, the Supreme Court of the United States accepted the United States Court of Appeals for the Tenth Circuit's definition of temporal proximity as "very close" timing between protected activity and adverse action.

III. THERE REMAINS AN ACKNOWLEDGED SPLIT AMONG THE CIRCUITS ON THE PRIMA FACIE CASE OF RETALIATION CLAIM WHEN APPLYING TIMING (TEMPORAL PROXIMITY) AND KNOWLEDGE AND IS THAT TEMPORAL PROXIMITY, ALONE, SUFFICIENT?

CAN EVIDENCE OF "VERY CLOSE" TIMING (TEMPORAL PROXIMITY) RAISE INFERENCE, SHOW PRETEXT AND SURVIVE SUMMARY JUDGMENT?

This Court appears to consider the scope of employee protection against retaliation to be an important question. It has moved the law concerning retaliation

forward and, as a result, a more robust jurisprudence may develop.

The Supreme Court In Clark County School Dist. v. Breeden, 121 S.Ct. 1508 (2001), the Supreme Court explained:

The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," O'Neal v. Ferguson Constr. Co., 237 F. 3d 1248, 1253 (CA10 2001). See e.g., Richmond v. Oneok, Inc., 120 F. 3d 205, 209 (CA10 1997) (3-month period insufficient); Hughes v. Derwinski, 967 F. 2d 1168, 1174–1175 (CA7 1992) (4-month period insufficient). Action taken (as here) 20 months later suggests, by itself, no causality at all.

The 10th Circuit In MacKenzie v. City and County of Denver, 414 F.3d 1266 (10th Cir. 2005), the court explained: "a causal connection is established where the plaintiff presents evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. Bullington, 186 F.3d at 1320 (quoting Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343 (10th Cir. 1982))." (internal quotations omitted).

In **FACT**, Magistrate Judge Tafoya's Recommendation states

"*Clearly, Plaintiff has made a sufficient prima facie case of retaliation.*"

Magistrate Judge Tafoya clearly weights the very close Temporal Proximity in Petitioners complaints to her Termination in her Recommendation that Retaliation Claim should precede to trail. Because Dean's Title VII discrimination claim fails the prima facie test according to Brimmer the District Court did not reach the other prongs owing to its ruling on the elements of retaliation, and they remain open on remand, also because the Appeals Court did not rely on evidence of temporal proximity to reach the causal link prong owing to its ruling on the elements of retaliation, it too should remain open on remand.

District Court Judge Brimmer's Judgment says:

"Plaintiff has not made prima facie claim of having engaged in protected opposition to discrimination."

US Court of Appeals for the Tenth Circuit Order and Judgment says:

"Communications were sufficient to qualify as protected opposition, but retaliation claim fails on the causal connection element."

Appeals Court States:

In order to succeed on a retaliation claim, a plaintiff must show: (1) she "engaged in protected opposition to discrimination"; (2) she "suffered an adverse employment action"; and (3) "there is a causal connection between the protected activity and the adverse employment action." Petersen v. Utah Dep't of Corr., 301 F.3d 1182, 1188 (10th Cir. 2002). The district court concluded that CSC is entitled to

summary judgment on Ms. Dean's retaliation claim because she failed to establish a prima facie case of retaliation. We agree, although based on slightly different reasoning.

Not only did the Appeals court admit to different reasoning in this case, but they are in clearly in conflict with other decisions they have made. The court's interpretation of section 704(a) is in some tension with Supreme Court precedent and the general practice of the federal judiciary in retaliation cases. The Tenth Circuit has developed into a Temporal Proximity Alone approach as well as inspired other circuits to do the same in the following cases. In the other courts of appeals, as well as in the Tenth Circuit, the interpretation of section 704(a) is largely questioned. The case presents the question whether the "very close" temporal proximity can satisfy the causal element and if "very close" is the employee protected under Title VII. The court of appeals held that it does not. In so doing it disregarded its own ruling in *See, e.g.*, Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1091 (10th Cir.2007); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001).

"[A] causal connection is established where the plaintiff presents evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1279 (10th Cir.2005) (internal quotations

omitted). Ms. Williams filed her discrimination charge before she was fired on March 29, 2002. W.D. Sports's written statement opposing her unemployment benefits was dated April 15, 2002, although it does not appear to have been received by the NMDOL until May 20, 2002. R. 1734. This temporal nexus is sufficient to infer that W.D. Sports's opposition to her claim was caused by Ms. Williams's filing her discrimination charge. *See Metzler v. Fed. Home Loan Bank of Topeka,* 464 F.3d 1164, 1171-72 (10th Cir.2006) (holding evidence that termination occurred no more than six weeks after employer knew employee intended to engage in protected activity was "very closely connected in time" and thus sufficient to establish causation (internal 1092*1092 quotation omitted)). Equally important, during the NMDOL hearing on her entitlement to benefits, Mr. Phillips allegedly said to Ms. Williams, "If you will drop your Human Rights claim, I won't fight you on your unemployment." R. 2600. A reasonable jury could quite reasonably infer from this a direct causal link between W.D. Sports's decision to impede Ms. Williams's benefits application and her decision to pursue discrimination charges with the NMDOL Human Rights Division. When the temporal proximity is dramatic, as it is here, the Petitioner should have the opportunity to argue her case to the jury and attempt to cross-examine the defendant to discredit the defendant's explanation for the employment decision.

CAN EVIDENCE OF KNOWLEDGE OF PROTECTED ACTIVITY RAISE INFERENCE, SHOW PRETEXT AND SURVIVE SUMMARY JUDGMENT?

This case also presents the question of evidence needed to satisfy "knowledge" requirement.

In *Clark County School District v. Breeden* the Supreme Court held simply that proof of retaliation requires proof of knowledge. The Court neither defined any standard for the knowledge requirement nor required direct evidence of knowledge. Presumably, proof of knowledge may be circumstantial. If so, temporal proximity should be sufficient to prove knowledge, in addition to proving the causal connection as a whole.

In 1973, in *McDonnell Douglas Corp. v. Green*, the Supreme Court of the United States adopted a burden shift for Title VII discrimination cases. Since McDonnell Douglas, all United States Courts of Appeals have adopted the burden shift for retaliation claims under Title VII as well. The burden shift involves three steps. First, the plaintiff must make a showing of a prima facie case of retaliation. If the plaintiff's showing is sufficient, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse action taken against the plaintiff. If the defendant articulates such a reason, the burden shifts back to the plaintiff to prove that the stated reason for the adverse action is actually a pretext for retaliation. Under the

burden shift, therefore, proving pretext satisfies the plaintiff's ultimate burden of proof in a retaliation claim.

The appeals court states that no evidence was provided to show O'Neil was privy to her statements.

In **FACT**, Mr. Smith (EEOC Representative for Petitioner/African American Male) had received oral complaints and emails from Petitioner, in response to her claim of race, gender and color, Harassment/Discrimination. Mr. Smith's stated to Petitioner that file was being transferred to Mr. Swerline (HR Representative for Defendant/Caucasian Male) for unknown reasons. Mr. Swerline had been working with Mr. O'Neil to handle Petitioner alleged Performance Problems. Petitioner has proved with this evidence that Mr. Swerline and O'Neil were well aware of Petitioners claims.

In **FACT**, In the February 9th 2010 meeting with Petitioner and O'Neil, Petitioner stated since O'Neil would not handle her complaints she would find another option. O'Neil responded with a direct unlawful act under Title VII, by stating if Petitioner did not stop with complaints she would receive Letter of Caution.

In **FACT**, O'Neil, by his own written admission, shows knowledge of Petitioners complaints.

In **FACT**, In Petitioners deposition p169 l.9-17 states that O'Neil says this is not about what people are doing to you, it about your performance. However,

the evidence shows Petitioner clearly did not have a performance incident between the time of their meeting and the issuing by O'Neil of the Letter of Caution, the Operations Meeting, or the Termination Date of the Petitioner, which all occurred within 17 days.

The Appeals court understanding of the factual showing required to satisfy the knowledge requirement of a retaliation claim was mistaken, however. For as this Court reiterated in Patane v. Clark, 508 F.3d 106 (2d Cir. 2007) (per curiam), "neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity." Id. at 115 (quotation marks omitted); *see also* Gordon, 232 F.3d at 117. Rather, the knowledge element is satisfied when a plaintiff has "complained directly" to another employee "whose job it was to investigate and resolve such complaints." Patane, 508 F.3d at 115; *see also* Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170, 1178 (2d Cir. 1996) ("[B]y complaining to an officer of the company . . . and maintaining her complaint during the subsequent internal investigation of the matter, [*7] the plaintiff was in effect communicating her concerns about Infantino's comments to Lawrence . . . .").

There is no dispute that Mr. O'Neil knew of Petitioners complaints on Feb 10. Thus, the district court erred in concluding that Ms. Dean's filing

complaints in Feb was insufficient to satisfy the knowledge requirement of the *prima facie* case.

Petitioner points out several forms of evidence that shows O'Neil was privy to Petitioner's complaints, and that coupled with the temporal proximity is more than enough to prove the causal link existed and survive summary judgment in her favor. With that being said this court should use her case as the vehicle for taking up this question and settling the dispute among the circuits through the articulation of a reasonable standard for satisfying the causal link.

Petitioner notes that there is clear conflict within this circuit and among the courts in deciding this case.

DISCUSSION

Petitioner contends that review is warranted to resolve a conflict in the circuits on the showing that an employee must make to demonstrate a prima facie case for purposes of a Title VII retaliation claim. In Burlington Northern & Santa Fe Rail way v. White, cert. granted, No. 05-259 (Dec. 5, 2005) (oral argument scheduled for April 17, 2006), the Court granted a petition for a writ of certiorari to resolve that conflict.

Petitioner contends that a writ of certiorari is warranted to review the court of appeals' determination that she failed to establish a causal connection between his protected activity and the challenged performance. In particular, petitioner argues that his showing of a causal connection was sufficient because CSC's challenged action, the issuing of the Letter of Caution occurred 1 day a after she first engaged in protected activity. For several reasons, that contention does not warrant review.

First, petitioner does not assert that the court of appeals' holding that she failed to introduce sufficient evidence of causality conflicts with the holding of any other court of appeals or any decision of this Court. Second, the causality question is fact-bound and does not raise any issue of recurring legal importance. As this Court has observed, "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an

adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (internal quotation marks and citation omitted). The question whether a17-day period between the protected activity and the adverse employment action is sufficient to raise an inference of causality simply involves the application of settled legal standards to the particular facts of this case.

Third, the decisions of the Tenth Circuit do not present the question whether, as a categorical matter, a 17-day period between the protected activity and the adverse action can ever raise an inference of causality. The court of appeals did not address the issue of causality in those terms. Instead, it held that "[t]he district court properly determined that [petitioner] did not make out a prima facie case for retaliation because she failed to establish a causal connection between his protected activity and his performance evaluation."

Nor did the district court reject petitioner's proof of causality on the ground that a 17-day period between the protected activity and the adverse action is always insufficient to create an inference of causality.

Instead, the court held that no reasonable inference of causality could be drawn based on the particular circumstances in this case because CSC first noted problems with petitioner's performance when

petitioner requested pay increase and job change base on hearsay by harassers. Because the court of appeals did not squarely address the question petitioner seeks to present, and the district court expressly based its decision on other grounds, the question petitioner seeks to raise is not presented.

This case presents the perfect vehicle to resolve multiple federal questions and matters on circuit splits, conflicts, misapplication and misinterpretation. Petitioner urges and prays that this court uses this case to inform society as a whole on the aforementioned issues surrounding Title VII Discrimination and Retaliation.

Petitioner witnessed several actions of which she experienced and felt were harassing, discriminatory and unfair treatment by Victoria Triplett (Harasser), Jake Johnson (Harasser) and Ken O'Neil (Manager). Such actions included denied pay increase, denied job transfer, stereotypical race and gender based comments, harassment and the forced removal of an older, white woman (Betty) from her position. Petitioner fulfilled her obligation as an employee by thoroughly following the processes outlined by the EEOC website to identify and adhere to the laws and rules of a Harassment/Discrimination and Retaliation Claims.

Using EEOC website and the Internet as a whole, Petitioner educated herself on processes to file complaint of harassment, employment discrimination laws and what constituted protection under the law.

After doing so, Petitioner began that process by attempting to stop harassment and address concerns by issuing an email to her supervisor, Dave Stroup. Petitioner's attempts received no investigation and Stroup simply told Petitioner to handle it between her and harassers.

Shortly after attempting to settle problems with harassers, O'Neil received allegations from those Harassers who made the stereotypical derogatory remarks and provided performance hearsay into O'Neal's employment decisions of Petitioners HR Policy Violations and Letter of Caution. All of the evidence that CSC and O'Neil relies upon is exclusively based upon hearsay evidence regarding performance. O'Neil by his own admission used those alleged non-witnessed performance violations by harassers, which were made at the time of and in reference to those employment decisions. Therefore it is possible to infer that the decision makers were influenced by those [discriminatory] feelings. Petitioner believed that Anti-Discrimination Laws of this nation protect her against an employer who does not investigate such claims, With that being said at what point do you take away these rights to individuals opinion and beliefs to actions experienced by them and allow harassers to be heard and actions to be taken without giving that equal right to the person claiming Discrimination and Harassment, whether they have specifically mentioned race or gender as it

is a given. The Direct evidence of admission by the O'Neil (Decision-Maker) that his actions were based upon the prohibited animus.

Although, having corporate and independent knowledge in form of email and comments in meeting, of complaints by Petitioner, O'Neil never addressed Petitioners complaints and only sent email of sleep policy to the work center employees, as Petitioner had complained for the second time that similar white employees were allowed to sleep. The EEOC Compliance Manual on Retaliation, at 8-9 (May 1998). The Compliance Manual states that "a complaint or protest about alleged employment discrimination to a manager, union official, co-worker, company EEO official, attorney, newspaper reporter, Congress person, or anyone else constitutes opposition."

At this point Petitioner took the next step to formally complain to a CSC Corporate EEO Official (Bill Smith, assumedly a black male). For reasons unknown, Smith was removed from Petitioners complaint and Lee Swerline (CSC HR Representative for O'Neil) was given the Petitioner's complaint file. After again receiving performance violations hearsay from harassers, O'Neil along with Swerline, set up meeting with Petitioner on Feb 9th. The outcome of this meeting with no violation of performance resulted in this email Statement by O'Neil;

When we spoke, I did in fact mention that I was going to give you one more chance and refrain from issuing the letter. We agreed that sleeping on the job, and failure to complete your timecard on a daily basis was between you and me and not others within the work center. The day following our meeting, you issue two complaints against personnel in these work centers in an effort to divert attention from your problem. Since you violated our agreement, I chose to issue the letter.

this could be considered the best form of direct evidence of retaliation.

In less than a two week period (establishing a Temporal Proximity), from the Feb 9th meeting to the issuing of Letter of Caution (Adverse Action) and February 23rd termination(Adverse Action) there were no Performance Incidents (Proffered Reason) that warranted the issuing of the Letter of Caution. The (Evidence) email noted above specifically states on paper that O'Neil had known (Knowledge) of Petitioners Complaints (Protected Activity) and chose to issue letter (Adverse Action) resulting in termination.

CSC's first and only attempt at conducting and investigating Petitioners complaints which began on Oct 5th was clearly after the damage had been done. It was then that Swerline conducted the first investigation of Petitioners that was rigged to reach a pre-determined conclusion or otherwise conducted in bad faith which should not satisfy the employer's remedial obligation. Clearly showing Pretext

(evidence tending to discredit the employer's reading).

CONCLUSION

The petition for a writ of certiorari should be reviewed and granted not as matter of right but because it is important to be provided uniform standards and application of such standards so that both employees and employers can be free of discrimination and retaliation. It is important that individual interpretation/discretion and application does not interfere or overrule what was intended by Congress for individuals to be free of discrimination and prejudice. So that Title VII can be recognized in an effort to prevent it and eliminate the amount of judicial time and effort spent on non applicable cases. The causal element is an issue that recurs frequently and consumes substantial judicial resources. It is of national importance that this court addresses or establishes a uniform standard for Causation with regards to Knowledge and Timing and the Evidence needed to Survive Summary Judgment. Courts differ significantly on the individual application of framework and a consistent standard for weighing temporal proximity has not yet been adopted.

It is the power of the courts discresion that sets forth the legal precedence that molds our society and enhances the quality of life for this nation as a whole. In this time of economic down turn it is vital that employees be heard as the job situation of this nation is hampered by employers trying to cut jobs and do so with hidden agendas. Recession is causing such said employees to have to represent themselves in

the judicial arena which without the proper knowledge of the law burdens the courts. It is vital that conflicting, clear and uniform laws and applications of said law is in place so that not only the judicial branch, attorneys and employers understand, but the employee's or underdog's of this society understand as well so that they too can determine if they have a valid case without burdening our judicial system with such questions. We have all been underdogs at one point in our lives it is the knowledge that is given to us that gives us the power to understand and move forward. We all have the right to be judged equally and with merit. Petitioner asks of the court not to look at this case as she is biracial, female, or Pro Se but as she is an individual of this society in which she is due her rights to protection under the laws of this nation applied and interpreted in a bias, equal and fair manner. This court has established a precedent by substantially changing the interpretation of the law and establishing new case law on Discrimination/Retaliation Claims. It is therefore the individual human's belief as to when they deserve protection as a right under the laws of this land. And if those beliefs are interpreted different amongst individuals, in which they usually are, then we must look to the law to give us clear uniform rules as to correct our beliefs. If there is conflict in the interpretation of those rules which were imposed by authority then we rely on this court to use its power

and discresion to lead us the way our forefathers had, to a clear uniform standard. The Petitioner in this case believed she followed the rules. She documented a history of events she experienced and believed were intentional Discrimination, Harassment and Retaliation. Those events were provided as facts to the courts. The interpretation of those facts and interpretation and application of law to those facts remain in dispute. The Petitioner does not want to burden this court with the detailed repeating of said facts, but she does wish to point out to this court the facts that relate to the conflicts between the courts in an effort to get a fair judgment. The Tenth Circuit as did CSC's gave Petitioners claims no credence or merit and failed to review the case as a whole, in doing so they applied laws at their discretion and inconsistent with this court and other courts. Should this case go un-reviewed, based on Petitioners lack of legal prowess, it will dissuade employees in the Tenth Circuit from complaining as well as show them that they are not protected by the laws outlined on the EEOC website whether they follow the complaint process or not. It will also show employers that they cannot be held liable for ignoring employee complaints and taking adverse actions on employees based on negative reports provided by harassers. This will not only affect the Tenth Circuit, but it will trickle between all circuits. Petitioner prays that this case be reviewed logically and consistent with the laws outlined by Congress.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

WHEREFORE, Petitioner seeks to be made whole and prays for judgment against

Defendants CSC for:

a. Back pays and lost benefits; front pay until normal retirement age;

b. Compensatory damages for his mental anguish, pain and suffering and

Other non-pecuniary losses;

c. His attorney fees and the costs and expenses of this action;

d. Punitive damages against individual defendants CSC; and

e. Such other relief as the Court deems just and equitable.

Respectfully submitted,

Sylvia Dean, *pro se*
3730 Masters Drive
Colorado Springs, Colorado 80907
(719) 573-5919 – Home
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DEMAND FOR A TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by a jury of twelve (12) persons in this action.

Sylvia Petitioner, *pro se*

DEAN v. COMPUTER SCIENCES CORPORATION

SYLVIA DEAN, Plaintiff-Appellant,

v.

COMPUTER SCIENCES CORPORATION, Defendant-Appellee.

No. 09-1280.

United States Court of Appeals, Tenth Circuit.

Filed June 30, 2010.

Before BRISCOE, Chief Judge, TYMKOVICH, and GORSUCH, Circuit Judges.

ORDER AND JUDGMENT *

TIMOTHY M. TYMKOVICH, Circuit Judge.

Sylvia Dean appeals pro se the district court's grant of summary judgment in favor of Computer Sciences Corporation (CSC) on her claims alleging race, color, and sex discrimination, hostile work environment, and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) & 2000e-3(a). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Factual Background

Ms. Dean worked for CSC from March 22, 2004, until her employment was terminated on February 23, 2006. During that time, CSC was providing services to Lockheed Martin Integrated Systems & Solutions (Lockheed) at the Cheyenne Mountain Mission Assurance Center (CMAC), as a subcontractor to Lockheed on a government contract (the "Lockheed Contract"). Ms. Dean worked for CSC as a database administrator (DBA) staffed on the Lockheed Contract. She was responsible for monitoring mission-critical computer systems at CMAC that

were gathering data from the North American Aerospace Defense Command. The Boeing Company (Boeing) and BAE Systems (BAE) were also subcontractors on the Lockheed Contract. In her DBA position, Ms. Dean worked with Boeing and BAE employees, as well as military personnel. Ms. Dean is African American and she claims she was the only black person working at CMAC.

Ms. Dean worked twelve-hour night shifts for CSC, on a schedule alternating three days on, three days off, three days on, then six days off. While employed by CSC, Ms. Dean also continued to work a full-time day job for another employer. On the days that she worked both of her jobs, Ms. Dean would get only one hour of sleep per day for up to three days in a row.

During most of her employment with CSC, Ms. Dean's supervisor was Kenneth O'Neil. Because Mr. O'Neil did not work onsite at CMAC, David Stroup, a Boeing employee, supervised her day-to-day work. Ms. Dean asked Mr. O'Neil for a pay increase in December 2004. She told him she had applied for a DBA position with Boeing at a higher salary. Mr. O'Neil did not give her the significant raise she sought. He responded in an email that he considered her an average performer. He contrasted her performance, which he indicated may have been impacted by her working two jobs, with the performance of a co-worker, who he said had saved the Lockheed Contract tens of thousands of dollars and about whom he routinely received positive feedback.

Ms. Dean testified that her working relationships with several people staffed on the Lockheed Contract deteriorated after her communications with Mr. O'Neil about the pay increase. She identified these other workers as Ms. Triplett, a Boeing employee (and

the co-worker Mr. O'Neil referred to in his December 2004 email); Mr. Johnson, a BAE employee; and Mr. Robinson, a CSC employee. According to Ms. Dean, Ms. Triplett and Mr. Johnson regularly worked the day shift together. She said they would put new procedures in place during their shift, fail to document them, then criticize the night shift DBAs who didn't follow the new procedures. Ms. Dean also alleged that Ms. Triplett and Mr. Johnson were responsible for "ousting" a white female employee named Betty from a Boeing DBA position because she was too slow. Aplee. Supp. App. at 42. She contended Ms. Triplett and Mr. Johnson had "clout" with Mr. O'Neil because of their close relationship with him. *Id.* at 43. Ms. Dean complained that she was constantly under surveillance by Ms. Triplett, Mr. Johnson, and Mr. Robinson, who reported her performance issues directly to Mr. O'Neil, rather than to Mr. Stroup. One such performance issue related to Master Station Log (MSL) entries, which were part of Ms. Dean's DBA job responsibilities and involved documenting her monitoring activities in a reporting system designed by Mr. Robinson. She felt that she was being singled out for deficiencies in her MSL entries by Ms. Triplett, Mr. Johnson, and Mr. Robinson.

Ms. Dean met with Mr. Stroup about her MSL entries in October 2005 and complained to him specifically about Mr. Johnson and Ms. Triplett. She followed up with an email to Mr. Stroup, saying that she felt she had been "taking a lot of heat from people" for requesting a shift change, for her MSL entries, and for having a second job. Aplee. Supp. App. at 148. Ms. Dean does not dispute that her email accurately summarized the concerns she raised in their meeting. Her email did not mention any allegation of race,

color, or sex discrimination. She did describe numerous personal problems she was experiencing at the time, which she admitted were affecting her work. Ms. Dean forwarded this email to Mr. O'Neil in December 2005.

Ms. Dean met with Mr. O'Neil on December 8, 2005, to review several performance issues involving insubordination, sleeping on the job, leaving before completing her shift, and failing to complete her time card on a daily basis. Ms. Dean did not deny the performance allegations, but she complained that she was being singled out for infractions other employees were also committing. Shortly after this meeting, Mr. O'Neil distributed an email reminding all Lockheed Contract staff that sleeping on the job was not condoned. In early February 2006, Ms. Dean learned from a co-worker that Mr. O'Neil was investigating a new allegation about her sleeping on the job. She claims that Mr. O'Neil began this investigation after she asked another CSC employee not to report her if he had seen her sleeping on her shift. Ms. Dean asserts that Mr. Johnson and Ms. Triplett overheard her conversation with the other CSC employee and reported it to Mr. O'Neil.

Ms. Dean was scheduled to meet with Mr. O'Neil again on February 9 to discuss her ongoing performance issues. The day before, on February 8, she submitted a complaint to William Smith in CSC's employee relations department regarding "Discrimination and Harassment." Aplee. Supp. App. at 151. She asserts that she submitted this complaint because she wanted to go on record with her side of the story before being disciplined by Mr. O'Neil. In her email to Mr. Smith, she described herself as "a single black mother" of two young children, "working

two jobs," with "several medical condi[]tions and other things on [her] plate." *Id.* She stated she tried "desperately not to doze off at work while medicated and working two jobs." *Id.* at 152. She claimed that all night-shift employees tend to doze off, but not all were being disciplined for it. Regarding Ms. Triplett and Mr. Johnson, she claimed they were the source of every complaint about her performance to their friend, Mr. O'Neil. She said they were trying to have her fired because they did not like her. She characterized Ms. Triplett's, Mr. Johnson's, and Mr. O'Neil's behavior toward her as harassing and discriminating.

Ms. Dean admitted in her testimony that she did not make any allegation of race, color, or gender discrimination in her February 8 email to Mr. Smith. But she claimed she told him orally that she felt she was being harassed and discriminated against based on her sex and race. She described to Mr. Smith comments made to her by Mr. Johnson that she believed to be sexually and/or racially derogatory. She testified that he made such remarks "two or three, four or five" times, Aplee. Supp. App. at 99, and provided the following examples:

"How can you afford to live in a high-end neighborhood and drive a nice car when I can't do that?" *Id.* at 50.

"How can your husband not work? You must be doing something else." *Id.*

"Look at the car you drive. It's a drug dealer's car. Look at the house you live in. How can you afford that without doing something on the side?" *Id.* at 92.

"You've got that nice car. What are you doing on the side? What does your husband do on the side? He doesn't work. What does he do?" *Id.* at 101.

"A woman is supposed to be at home with her kids. Why are you working two jobs?" *Id.* at 98.

Ms. Dean admitted that she did not report these comments to anyone at CSC at the times they were made. She also admitted that she never heard Mr. O'Neil or any other CSC employee make any derogatory remark about her sex or her race. She explained that she was only comfortable discussing her race discrimination allegations with Mr. Smith because she believed he was also African American. She said she did not make such an allegation to her manager, for fear that he would take offense.

On February 9, Mr. O'Neil made clear to Ms. Dean that the focus of their meeting was her performance issues and he counseled her again regarding sleeping during her work hours and her continued timekeeping problems. According to Ms. Dean, Mr. O'Neil said he was not going to write her up for these infractions at that time. Later that day, Ms. Dean sent emails to Ms. Triplett's and Mr. Johnson's supervisors at Boeing and BAE. She asked them for assistance in making harassment complaints against Ms. Triplett and Mr. Johnson. She did not make any allegation of race-, color-, or gender-based harassment in her emails to Boeing and BAE.[1]

Ms. Dean sent an email to Mr. Smith on February 13, indicating that she might file a complaint with the EEOC. On February 14, Mr. O'Neil issued her a formal Letter of Caution, finding she had committed infractions related to sleeping on the job, asking other employees not to report her sleeping, and continued problems with her timekeeping practices. Ms. Dean refused to sign the Letter of Caution and she lodged a complaint with Lee Swerline in CSC's employee relations department that Mr. O'Neil had retaliated

against her for submitting her complaints about Mr. Johnson and Ms. Triplett to their employers. She once again admitted to "dozing off on the job," but asserted that the Letter of Caution was unfair because she had previously requested help via a shift change. Aplee. Supp. App. at 175.

On February 15, Mr. O'Neil acknowledged in an email to Ms. Dean that he decided to issue the Letter of Caution upon learning she had submitted complaints to Boeing and BAE, "in an effort to divert attention from your problem." *Id.* at 163. Later that day, Mr. O'Neil attended an operations management meeting with Lockheed personnel, at which Ms. Dean's job performance was discussed. Ms. Dean responded that night to Mr. O'Neil's February 15 email:

I am now in receipt of the "Letter of Caution" and I take full responsibility for my faults. I would like to work on these problems without having further distractions. . . . You are fully aware of my situation with [Mr. Johnson and Ms. Triplett] and we in fact discussed this in our meeting. The issue was discussed in our December meeting as well. I also discussed this with my immediate supervisor in October. So prior to any of this I had made claims of being singled-out, discriminated against and harassed and this was not addressed. So therefore, your suggestion of my diverting attention to another issue to avoid my problem i[s] invalid because I have continued to work in a hostile work environment where I knew I was being retaliated against. . . . This still remains an issue and only getting worse as I feel I am being singled-out, retaliated against and there is increased surveillance based on my complaints.

Aplee. Supp. App. at 162. She did not say that her complaints of discrimination and harassment were related to her race, color, or gender.

On February 16, 2006, a Lockheed employee issued a letter directing CSC to remove Ms. Dean from her "critical position" on the Lockheed Contract, based on "specified incidences [that] have prevented satisfactory fulfillment of the assigned job duties and responsibilities by the individual to the detriment of the [Lockheed Contract]." *Id.* at 181. The next day, February 17, Ms. Dean sent an email to Mr. Stroup, copying Ms. Triplett, Mr. Johnson, and Mr. Robinson, complaining again about scrutiny of her MSL log entries. She stated, "It remains a hostile work environment and that is simply because these three best of friends [Ms. Triplett, Mr. Johnson, and Mr. Robinson] choose to buddy up on me and then no longer report to you, but directly to [Mr. O'Neil]." *Id.* at 164. Mr. Stroup forwarded Ms. Dean's email to Mr. O'Neil the same day.

Meanwhile, Mr. Swerline was investigating Ms. Dean's harassment/discrimination claim. He asked her to provide more specifics—facts, dates, times, and names—to verify her allegations of workplace harassment. She testified that she referred Mr. Swerline to Mr. Smith. She also sent Mr. Swerline an email on February 17, with the same description of events and allegations she had made previously, adding a claim that Mr. O'Neil had ordered even more close supervision of her work. She indicated to Mr. Swerline that her next steps might be to hire an attorney and contact the EEOC and the Colorado Department of Labor. She refrained from specifically alleging that she was being harassed based on her race, color, or gender, but she queried what the

possible motivation for it could be: "Is it because I am a Black Woman? Is it because these four persons are good friends?" Aplee. Supp. App. at 172. Ms. Dean completed her last shift with CSC on February 17. Mr. O'Neil and Mr. Swerline spoke to Ms. Dean by telephone on February 23, 2006. As confirmed in a letter to Ms. Dean from Mr. O'Neil, he informed her that Lockheed had requested her removal from the Lockheed Contract and that her employment was being terminated under the CSC layoff policy because the company did not have another position available for her. There is no dispute that Mr. O'Neil made the decision to terminate Ms. Dean.

II. Procedural Background

Ms. Dean filed this action in district court, alleging that CSC had discriminated against her on the basis of her race, color, and sex in terminating her employment. Her complaint also alleged a hostile work environment and unlawful retaliation. CSC moved for summary judgment on all claims.

The district court referred CSC's motion to a magistrate judge, who recommended granting summary judgment on Ms. Dean's discrimination and hostile work environment claims, but allowing her retaliation claim to go to trial. The magistrate judge advised the parties they had ten days to serve and file written objections to the recommendation and that failure to file timely objections "will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge." Aplee. Supp. App. at 253. CSC objected to the magistrate judge's recommendation to deny summary judgment on Ms. Dean's retaliation claim. She filed no objections. The district court adopted the magistrate

judge's recommendation to grant summary judgment to CSC on Ms. Dean's discrimination and hostile work environment claims. But the court disagreed with the magistrate judge's assessment of her retaliation claim and, declining to adopt that portion of the recommendation, granted CSC summary judgment on that claim as well.

Ms. Dean filed motions for reconsideration and relief from judgment, in which she argued that she did not receive the magistrate judge's recommendation, so had no opportunity to object. She then filed a premature notice of appeal. This appeal was docketed, then abated pending the district court's ruling on her post-judgment motions. The district court denied Ms. Dean's motions, concluding that CSC had rebutted her claim that she did not receive the recommendation and, in any event, she was certainly aware of it, yet made no effort to review it and file timely objections. Ms. Dean did not file a separate notice appealing the district court's denial of her post-judgment motions.

III. Standard of Review

We review the district court's grant of summary judgment de novo, viewing all facts and all reasonable inferences from those facts in the light most favorable to Ms. Dean. *See Hinds v. Sprint/United Mgmt. Co.*,523 F.3d 1187, 1195 (10th Cir. 2008). Summary judgment is appropriate if "the evidence reveals no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Id.* We construe Ms. Dean's pro se appeal arguments liberally. *See de Silva v. Pitts*,481 F.3d 1279, 1283 n.4 (10th Cir. 2007).

IV. Discussion

Waiver of Appellate Review

The magistrate judge recommended granting CSC's motion for summary judgment on Ms. Dean's discrimination and hostile work environment claims. The record unequivocally shows that she failed to timely object to the recommendation. The district court thereafter adopted the magistrate judge's recommendation in granting CSC summary judgment on these two claims.

"We have adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate. The failure to timely object to a magistrate's recommendations waives appellate review of both factual and legal questions." *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quotations, citation, and brackets omitted). "The waiver rule applies to pro se litigants, provided they were informed of the time period for objecting and the consequences of failing to object." *Wardell v. Duncan*, 470 F.3d 954, 958 (10th Cir. 2006). The magistrate judge specifically advised Ms. Dean of these conditions.

But "[t]he waiver rule may be suspended when the `interests of justice' warrant, or when the aggrieved party makes the onerous showing required to demonstrate plain error." *Id.* (citation omitted). In assessing whether the interests of justice favor an exception to the firm waiver rule, "we have considered factors such as a *pro se* litigant's effort to comply, the force and plausibility of the explanation for his failure to comply, and the importance of the issues raised." *Duffield*, 545 F.3d at 1238 (quotation omitted). The first two of these factors do not weigh in Ms. Dean's favor. Although she persists in asserting that she did not receive the magistrate judge's recommendation, and therefore could not file timely objections to it, the

district court held otherwise in denying her post-judgment motions, and she has not appealed that ruling. *See* Fed. R. App. P. 4(a)(4)(B)(ii) (requiring party intending to challenge order disposing of post-judgment motion to file notice of appeal or amended notice of appeal).

To assess whether the importance of the issues raised might trigger the interests of justice exception, we review Ms. Dean's discrimination and hostile work environment claims for plain error. *See Duffield*, 545 F.3d at 1238. Plain error is "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted). "[A]n error is `plain' if it is clear or obvious at the time of appeal . . . ." *Morales-Fernandez v. INS*, 418 F.3d 1116, 1124 (10th Cir. 2005).

The magistrate judge's recommendation, as adopted by the district court, concluded that, even if Ms. Dean satisfied her burden to prove a prima facie case of race, color, or sex discrimination under the familiar *McDonnell-Douglas* burden-shifting framework, CSC proffered a legitimate, nondiscriminatory explanation for her termination, thus shifting the burden back to her to show that CSC's reason was a pretext to conceal intentional discrimination. *See Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1167-68 (10th Cir. 2007) (describing pretext analysis).

The court then held that Ms. Dean failed to show a genuine issue of material fact that CSC's proffered basis for her termination was pretextual, noting she acknowledged that sleeping on the job was against company policy, there was no evidence that CSC acted contrary to written or unwritten policy in terminating

her, and she presented no evidence that she was treated differently from other similarly situated, non-protected employees. *See id.*

On her hostile work environment claim, the district court also adopted the magistrate judge's findings in the recommendation, concluding that Mr. Johnson's alleged statements were insufficient to establish a workplace "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1097 (10th Cir. 1999) (quotations and brackets omitted).

On appeal, Ms. Dean fails to demonstrate an error by the district court so plain and substantial as to satisfy the requirements for plain error review. *See Wardell*, 470 F.3d at 958. "We need not pursue the point any further. Indeed, to do so would undercut . . . the firm waiver rule . . . ." *Id.*

Retaliation

The magistrate judge recommended denial of CSC's motion for summary judgment on Ms. Dean's retaliation claim. CSC filed objections to that portion of the recommendation. After reviewing the parties' summary judgment arguments de novo, the district court granted CSC summary judgment on her retaliation claim as well. She asserts that the district court's decision was in error.

In order to succeed on a retaliation claim, a plaintiff must show: (1) she "engaged in protected opposition to discrimination"; (2) she "suffered an adverse employment action"; and (3) "there is a causal connection between the protected activity and the adverse employment action." *Petersen v. Utah Dep't of*

Corr.,301 F.3d 1182, 1188 (10th Cir. 2002). The district court concluded that CSC is entitled to summary judgment on Ms. Dean's retaliation claim because she failed to establish a prima facie case of retaliation. We agree, although based on slightly different reasoning.

In *Petersen*, we held that, in order to engage in protected opposition to discrimination, an employee must oppose an employment practice made unlawful by Title VII. *See id.* Title VII makes it unlawful for an employer "to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Thus, an employee's complaints regarding unfair treatment, no matter how unconscionable, cannot be "protected opposition to discrimination" unless the basis for the alleged unfair treatment is some form of *unlawful* discrimination. *See Petersen*, 301 F.3d at 1188. And in order to establish a causal connection between the protected opposition and the adverse employment action, the employee's superior must have knowledge that he or she is engaging in such protected opposition, because "[a]n employer's action against an employee cannot be *because* of that employee's protected opposition unless the employer knows the employee has engaged in protected opposition." *Id.*;*see also Williams v. Rice*,983 F.2d 177, 181 (10th Cir. 1993) (holding plaintiff failed to prove causal connection between protected activity and employer's action absent evidence supervisor who made termination decision was aware of his EEO complaints).

Here, Ms. Dean alleged that Mr. O'Neil issued the Letter of Caution, and ultimately decided to terminate her employment, in retaliation for the

complaints she made about harassment and discrimination. Mr. O'Neil acknowledged that he decided to issue the Letter of Caution in reaction to her sending complaints to Boeing and BAE about Ms. Triplett and Mr. Johnson.

But the issue is whether Ms. Dean conveyed to Mr. O'Neil a concern that CSC had engaged in a practice made unlawful by Title VII. "Although no magic words are required, to qualify as protected opposition the employee must convey to the employer his or her concern that the employer has engaged in a practice made unlawful by [Title VII]." *Hinds*, 523 F.3d at 1203. Ms. Dean contends that she conveyed to CSC her concern that it had engaged in sex, race, and color discrimination.

A review of the record indicates that nearly all of Ms. Dean's complaints to CSC regarding "harassment" and "discrimination" made no mention of race, color, or sex. Notably, her complaints to Boeing and BAE, which Mr. O'Neil admitted spurred him to issue the Letter of Caution, did not allege race-, color- or gender-based harassment or discrimination. But Ms. Dean did testify that she told Mr. Smith about Mr. Johnson's alleged derogatory remarks and that she informed him she felt she was being harassed and discriminated against based on her gender and race. She also points to three emails that she asserts put CSC on notice regarding her protected opposition to discrimination: (1) her February 8, 2006 email to Mr. Smith, in which she referred to herself as a "single black mother"; (2) her February 13, 2006 email to Mr. Smith, indicating that she might file a complaint with the EEOC; and (3) her February 17, 2006 email to Mr. Swerline, in which she hypothesized that the conduct she complained of could have been based on her being

a black woman, or could have occurred because the four people involved were good friends. In her February 17 email she also informed Mr. Swerline that her next step might be to contact the Colorado Department of Labor and the EEOC.

We agree with the district court that, when read in context, Ms. Dean's reference to herself as a "single black mother" in her February 8 email was not an assertion of a discriminatory motive for the conduct of which she complained. Indeed, she admitted in her testimony that she made no allegation of race, color, or gender discrimination in that email. But her oral statement to Mr. Smith that she believed the alleged harassment and discrimination she complained of was race- and gender-based sufficiently conveyed a concern that CSC was permitting a practice made unlawful by Title VII. Her February 13 and 17 emails both indicated that she might file an EEOC complaint. These communications, particularly when coupled with her previous oral statements to Mr. Smith and her allusion to color- and sex-based harassment in her February 17 email to Mr. Swerline, may also have been sufficient to qualify as protected opposition.[2] We need not decide that question because Ms. Dean's retaliation claim fails on the causal connection element. *See Hinds*, 523 F.3d at 1203.

Ms. Dean points to no evidence in the record indicating that Mr. O'Neil was privy to her statements to Mr. Smith, or that Mr. O'Neil received copies or otherwise learned the contents of her February 8, 13, or 17 emails. *See id.* (holding plaintiff failed to establish causation with competent evidence that decisionmaker saw document alleged to convey protected opposition to discrimination). In fact, she testified that she made a conscious decision *not* to

report her claim of race discrimination to her supervisor. And she has never alleged that Mr. Smith or Mr. Swerline harbored discriminatory animus toward her, such that they knew and used Mr. O'Neil as a "cat's paw" to effect their own biased designs. *See Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1176 (10th Cir. 2007). Therefore, Ms. Dean failed to establish a causal connection between her protected opposition to discrimination and Mr. O'Neil's decision to terminate her employment. *See id.* The district court did not err in granting summary judgment in favor of CSC on Ms. Dean's retaliation claim.

The judgment of the district court is AFFIRMED.

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1. Ms. Dean's email to Ms. Triplett's supervisor is not in the record, but she does not dispute that its content was generally the same as the email she sent to Mr. Johnson's supervisor.

2. In concluding that Ms. Dean failed to establish she engaged in protected opposition to discrimination, the district court did not consider her February 13 and 17 emails to Mr. Smith and Mr. Swerline. And the court

appeared to conclude that, because the allegedly discriminatory comments she reported to Mr. Smith were insufficient to support a prima facie case of discrimination, they were also insufficient to put CSC on notice of her discrimination claim. But Ms. Dean's opposition to discrimination could be protected even if her claim had no merit. *See Petersen*, 301 F.3d at 1188. And although her description of Mr. Johnson's statements alone may have been too vague to convey the nature of her complaint, she testified that she told Mr. Smith of her belief that the alleged harassment and discrimination was based on her race and gender.

IN THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF COLORADO

JUDGE PHILIP A. BRIMMER

SYLVIA DEAN,

Plaintiff, v.

COMPUTER SCIENCES CORPORATION,

Defendant.

JUDGMENT

Pursuant to and in accordance with the Order Accepting Magistrate Judge's Recommendation In Part, Overruling Magistrate Judge's Recommendation In Part and Dismissing Plaintiff's Claims, entered on May 19, 2009, by Judge Philip A. Brimmer, which is incorporated herein by reference as if fully set forth, it is ORDERED that the Recommendation of Magistrate Judge Kathleen M. Tafoya, entered on February 25, 2009 is accepted

regarding the recommendation that plaintiff's claims of discriminatory termination and hostile work environment be dismissed. It is FURTHER ORDERED that Defendant's Motion, For Summary Judgment, filed July 16, 2008 is granted. It is ((FURTHER ORDERED that judgment shall enter in favor of defendant Computer Sciences Corporation and against the plaintiff Sylvia Dean. It is FURTHER ORDERED that the complaint and this civil action are dismissed with prejudice. It is FURTHER ORDERED that defendant may have its costs upon the filing of a Bill of Costs within ten days from entry of judgment.

DATED this 19th day of May, 2009.

FOR THE COURT;

Gregory C. Langham, Clerk

By: s/ Edward P. Butler

Edward P. Butler, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Judge Philip A. Brimmer

Civil Action No, 07-cv-00823-PAB-KMT

SYLVIA DEAN,

Plaintiff,

v.

COMPUTER SCIENCES CORPORATION,

Defendant.

ORDER ACCEPTING MAGISTRATE JUDGE'S RECOMMENDATION IN PART, OVERRULING MAGISTRATE JUDGE'S RECOMMENDATION IN PART", AND DISMISSING PLAINTIFF'S CLAIMS

This matter is before the Court on the Recommendation of United States Magistrate Judge Kathleen M, Tafoya filed on February 25, 2009 [Docket No. 63]. The Recommendation states that objections to the Recommendation must be filed within ten days after its service on the parties. See also 28 U.S.C. § 636(b)(1)(C). The Recommendation was served on February 25, 2009. Plaintiff has not objected to the Recommendation, which recommends that the Court dismiss'all of plaintiff's claims except for her retaliation claim, Defendant objects to that portion of the Recommendation concerning plaintiff's claim that defendant unlawfully retaliated against her.

A. Discrimination and Hostile Work Environment Claims

In the absence of an objection, the district court may review a magistrate judge's recommendation under any standard it deems appropriate. Summers v. Utah, 927 F.2d 1165, 1167 (10th Cir. 1991); see also Thomas v. Am, 474 U.S. 140, 150 (1985) ("[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a cfe novo or any other standard, when neither party objects to those findings"). In this matter, I have reviewed that portion of the Recommendation recommending the dismissal of certain of plaintiff's claims - i.e., her claims of discriminatory termination of her employment and a hostile work environment - to satisfy myself that there is "no clear error on the face of the record."1 See Fed. R. Civ. P. 72(b), Advisory Committee Notes. Based on this review, I have concluded that this portion of the Recommendation is a correct application of the facts and the law.

B. Retaliation Claim

Concerning plaintiff's retaliation claim, I have reviewed the parties' arguments in the summary judgment briefs de novo. Because Ms. Dean is proceeding pro se, the Court construes her pleadings liberally. Raines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (16th Cir. 1991).

Defendant objects to the; Magistrate Judge's Recommendation on three grounds: First, that the plaintiff's harassment and discrimination complaints to defendant were n too vague to constitute protected activity. Objection at 4. Second, that plaintiff's

complaints of harassment and discrimination were not made in good faith and thereby were not protected activity. Id. at 7. Third, that plaintiff's claim of retaliation otherwise fails./c/.at8.

"This standard of review is something less than a "clearly erroneous or contrary to law" standard of review, Fed. R. Civ. P. 72(a), which in turn is less than a de novo review. Fed. R. Civ, P. 72(b).

1. Legal Standards

To succeed on a claim of retaliation a plaintiff must show: (1) that she engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action. Haynes v. Level 3 Comme'ns, LLQ, 456 F.3d 1215, 1228 (10th Cir, 2006). "Opposition" to an employer's conduct is protected by § 2000e-3(a) only if it is opposition to a "practice made an unlawful employment practice by [Title VII]." Petersen v. Utah Dept. of Com, 301 F.3d 1182, 1188 (10th Cir. 2002). "Although no magic words are required, to qualify as protected opposition the employee must convey to the employer his1 or her concern that the employer has engaged in [an unlawful practice]." Hinds v. Sprint/United Mgmt. Co., 523 F.3d 1187, 1202-03 (10th Cir. 2008) (finding that certain e-mails sent by the plaintiff did not constitute protected opposition when "[n]owhere in either e-mail [did] [plaintiff] mention or even allude to ,. . discrimination, . . . General complaints about company management and

one's own negative performance evaluation will not suffice."). See also Anderson v. Academy Sch. Dist. 20, 122 Fed. App'x 912, 916 (10th Cir. 2004) (unpublished opinion) ("a vague reference to discrimination and harassment without any indication that this misconduct was motivated by race (Or another category protected by Title VII) does not constitute protected activity and will not support a retaliation claim"). W/7//a/77s v Universal Enterprises, LLC, No. CIV-07-0801-HE, 2008 WL 2390818, at*4 (W, D. Okla. June 9, 2008) ("absence of any statement to his supervisors indicating he believed the incident was racially discriminatory precludes Williams' retaliation claim"); Taherv Wichita St. Univ., 526 F. Supp. 2d 1.203, 1221 (D. Kan, 2007) (no protected activity exists where plaintiff complained of "discrimination" and "harassment," but did not complain that such action was motivated by his national origin). As the court in Petersen explained, Section 2000e-3(a) bars retaliation by an employer only if it is 'because [the employee] has opposed any practice made an unlawful employment practice by [Title VII].' An employer's action against an employee cannot be because oithat employee'sprotected opposition,unlessJhe employer knows the employee has engaged in protected opposition. 301 F.3d at 1188 (emphasis in original).

2. Analysis

Construed liberally, plaintiffs retaliation claim appears to be based on two adverse actions by defendant. First, defendant's issuance of a Letter of

Caution to plaintiff on February 14, 2006. In an email that plaintiff's supervisor, Kenneth O'Neil, sent to plaintiff On February 15, 2006, O'Neil stated that he had originally agreed to give plaintiff another chance, but when she "iSsue[d] two complaints against personnel in these work centers in an effort to divert attention from [Dean's] problem," see Sum. J. Mot. [Docket No. 38], ex. A-12, he issued the Letter of Caution. Second, plaintiff appears to base her retaliation claim on defendant's termination of her on February 23, 2006.

The first step in analyzing plaintiff's retaliation claim is to determine whether she conveyed to defendant her concern that it had engaged in an employment practice made unlawful by Title VII. Hinds, 523 F. 3d at 1202-03.

The "two complaints" that O'Neil referred to in his February 15, 2006 email are complaints that plaintiff made against Victoria Triplett, an employee of Boeing, and Jake Johnson, an employee of BAE Systems. Plaintiff made these complaints to their respective employers via an email dated February 9, 2006, See Sum. J. Mot. [Docket No. 38], ex. A-11. O'Neil learned about these complaints, given that he referred tp them in his February 15, 2006 email. However, plaintiff's February 9, 2006 email makes no suggestion that Johnson and Triplett discriminated against her or harassed her based on race or gender. Thus, her February 9, 2006 email regarding Triplett and Johnson does not constitute protected activity

and provided no basis for defendant to have retaliated against her based on protected activity.

Moreover, in her Title VII Complaint [Docket No. 1], plaintiff makes no allegation that she complained of race or sex discrimination by Triplett and Johnson, Nor do any of her emails to defendant before she made the complaints against Triplett and Johnson suggest that they had discriminated against her on racial or gender grounds. For example, on February 8, 2006, plaintiff sent an email to William R. Smith in the Human Relations department. See Sum, J. Mot. [Docket No. 38], ex. A-8. The email states that she is making a complaint regarding "Discrimination and Harassment" against Triplett and Johnson for harassing her at work and that O'Neil was discriminating against her based on what Triplett and Johnson told him. However, nowhere in this email does the plaintiff claim that such harassment is due to race or sex discrimination. Although plaintiff states in the email that "I am a single black mother," she does so in the context of explaining her difficult personal circumstances and not to explain any discriminatory motive or action by Triplett, Johnson, or O'Neil. 5

In her deposition, plaintiff testified that she had telephone conversations with Smith wherein she claimed to have been discriminated against on the basis of gender and race. Id., ex. A-2 at 213. When asked what she told Smith, she testified that it related to comments that Johnson had made to her. Id., ex. A-2 at 213-214, The substance of these

comments is set forth in the Recommendation, at page 18, The Magistrate Judge determined that none of these comments made out a prima facie claim of either race or gender discrimination, and plaintiff did not object to such finding in the Recommendation. The email that plaintiff sent to Smith on February 8, 2006 contains no suggestion of race or gender discrimination.

Plaintiff did not inform anyone else at Computer Sciences Corporation that she had been discriminated against based on her race or gender. In her deposition, plaintiff testified that "[m]ain|y, my race and discrimination comments were with Bill [Smith]. .. ," See Opp. to Sum J. Mot. ex. A-2 at 215, Plaintiff did not identify anyone else at defendant corporation whom she told about her allegations of race or gender discrimination. Moreover, plaintiff admitted that the things that she told Smith were all of the incidents of race and gender discrimination of which she was aware. Id., ex. A?2 at 218-219.

The Court finds that any claim of discrimination plaintiff made to Smith based on Johnson's comments was too vague to convey to the defendant that plaintiff was engaging in protected opposition to discrimination.

Finally, plaintiff has not cited any evidence that, after O'Neil issued the Letter of Caution, she made defendant aware that she was basing her allegations of discrimination, harassment, or retaliation on race or sex discrimination. Even construing plaintiff's pleadings liberally and making reasonable inferences

in her favor, see Carolina Cas. Ins. Co. v. Yeates, 533 F.3d 1202, 1204 (10th Cir. 2008), there is no evidence in the record that defendant had reason to believe that plaintiff engaged in protected opposition to discrimination under Title VII.

In light of the fact that the Court does not find that plaintiff has made a prima facie claim of having engaged in protected opposition to discrimination, it is unnecessary to review defendant's other objections to the Recommendation.

Accordingly, it is

ORDERED as follows:

1. The Recommendation of United States Magistrate Judge [Docket No. 63] is ACCEPTED in part and OVERRULED in part. That portion of the Recommendation recommending that the Court dismiss plaintiff's claims of discriminatory termination and a hostile work environment is accepted. That portion of the Recommendation recommending plaintiff's claim for retaliation be allowed to proceed to trial is overruled. Summary judgment enters in favor of the defendant on all counts,

2. Pursuant to Federal Rule of Civil Procedure 56, this matter, and all claims asserted therein, is dismissed with prejudice, with each party to bear its own attorneys' fees. Defendant is entitled to its costs. See©.C.COLO.LCivR 54.1 and Fed. R. Civ, P.54(d)(1).

3. The Clerk shall forthwith enter judgment in favor of defendant ComputerSciences Corporation and

against plaintiff Dean, dismissing plaintiff's claims with prejudice, Defendant Computer Sciences Corporation is awarded its costs.

4. All other pending motions are DENIED as moot.

DATED May 19, 2009.

BY THE COURT:

s/Philip A. Brimmer

PHILIP A. BRIMMER

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 07-cv-00823-PAB-KMT
SYLVIA DEAN,
Plaintiff,
v.
COMPUTER SCIENCE CORPORATION,
Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE Magistrate Judge Kathleen M. Tafoya

This matter is before the court on "Defendant's Motion for Summary Judgment." ("Mot.) [Doc. No. 38, filed July 16, 2008]. Plaintiff filed "Plaintiff's Response to Motion for Summary Judgment" ("Rsp.") [Doc. No. 50] on September 19, 2008 and Defendant filed "Defendant's Reply in Support of its Motion for Summary Judgment" on October 7, 2008. [Doc. No. 51]. The issue is ripe for recommendation and ruling. Defendant moves for summary judgment on Plaintiff's claims of unlawful discrimination based on race, color and gender, harassment creating a hostile work environment and retaliation.

Defendants claim that Plaintiff was lawfully terminated in response to a client directive to remove her from its contract for her poor performance and inappropriate behavior. They argue that Plaintiff's race, color, gender, and/or alleged participation in protected activity played no role in her treatment at

work or in her ultimate termination from employment and Plaintiff has failed to establish a prima facie case of unlawful discrimination, retaliation, or harassment. Further, Defendants argue that Plaintiff has also failed to demonstrate that Computer Science Corporations's ("CSC") legitimate reasons for termination were pretextual.

Factual Background

The following facts are taken from Plaintiff's Complaint, the undisputed facts in both the Motion and the Response and the parties' submissions.

Plaintiff, an African-American female, was a CSC employee staffed on a Lockheed Martin Integrated Systems & Solutions contract from March 22, 2004 until February 23, 2006. (Compl. at 3-5; Mot., Undisputed Facts ["UF"] 1; Rsp. accord). While employed by CSC, Plaintiff worked on a night shift in the Cheyenne Mountain Mission Assurance Center ("CMAC") as a Database Administrator ("DBA") and was responsible for monitoring the computer systems gathering data from the North American Aerospace Defense Command ("NORAD"). (Mot. UF 1,2; Rsp. accord). Dave Stoup, a Boeing employee, oversaw the work of the CMAC team, including CSC, Boeing and BAE personnel. (Id.) During the relevant period, Plaintiff reported to Kenneth W. O'Neil, a CSC Senior Manager. (Mot. UF 3-4; Rsp. accord).

In her role as a CMAC DBA, Plaintiff was required to complete several types of documentation during the course of each shift, which included accurately describing her database monitoring activities in a

Master Station Log ("MSL"). (Mot. UF 5; Rsp. accord). Some time prior to December, 2004, Plaintiff interviewed for a job at Boeing but was not allowed to transfer within companies on the same contract. (Compl. at 3).1 Ultimately, Victoria Triplett, one of the people Plaintiff alleges is responsible for her later harassment, was awarded the Boeing job for which Plaintiff applied. (Compl. at 3). Thereafter Plaintiff sought a salary increase from CSC's O'Neil which she characterized as a "Performance Increase." (Mot., Exh. A-6, email from Plaintiff dated December 1, 2004 at 8:06 a.m.). Mr. O'Neil responded, "As for a major increase based upon performance the feedback that I get about your performance is average at best. I have been told that your attention to detail is lacking, and this may be related to you being more tired than usual holding down two jobs. I have also been told that you do not necessarily complete all required shift paperwork, sometimes leaving the oncoming DB wanting when it comes to activity/problems from the previous shifts I have not received any over and above feedback on your performance to date." (Id., email from Kenneth O'Neil, dated December 2, 2004 at 8:57 a.m.). Plaintiff responded to the email and in a follow-up email from Mr. O'Neil he stated, "Sylvia, I did not say your performance was an issue, what I said is that I consider you an average performer . . ." (Id., email from Kenneth O'Neil, dated December 4, 2004 at 09:28:48).

1 The parties dispute why Plaintiff was not allowed to take the Boeing job, however neither the reason for nor the fact that Plaintiff did not get the Boeing position is material to the courts review of this motion.

Approximately ten months after this exchange, on October 5, 2005, Plaintiff met with Boeing point-of-contract Stoup to discuss issues involving Plaintiff's alleged deficient MSL entries and her complaint that Jake Johnson (BAE employee)2 and Victoria Triplett (Boeing employee) were overly critical of her work performance. (Id.) Either prior to or immediately following this meeting, Plaintiff sent Stoup an email.3 The parties do not dispute that this email constituted a summary of the concerns Plaintiff raised in her meeting with Stroup. (Mot. UF 8; Rsp. re UF 8). In the email, Plaintiff admits, "Recently I feel like I have been taking a lot of heat from people for: . . . 2) MSL Entries." (Mot., Exh. A-7, email from Plaintiff dated October 5, 2005 at 2:29 p.m.) After explaining the difficult circumstances she was dealing with in her personal life, Plaintiff states, "This is enough to cause anyone to slip or not be overly expressive in an MSL entry." (Id.) Further she states, "I do my job to the best of my abilities although that may not be equal to some of the other people's standards. I am sure that everyone is not perfect with MSL entries. I am not sure how I became the MSL center of attention or why my coworkers and not my supervisor are constantly reviewing my MSL entries for content but I will

try to do my best in being more thorough in logging, because I cannot afford to lose my job."

2 According to his direct supervisor and not apparently contested by the parties, "Jack Johnson has functional responsibilities (as to other CMAC personnel) that include reviewing or checking on performance results of other CMAC people and reporting his observations to appropriate ISC2 functional leads." (Mot., Exh. A-11, email from Doug Fish at N-BAE Systems to Plaintiff dated February 10, 2006).

3 The email states, "I have to speak my mind because I was not able to earlier . . ." indicating the email was sent after the face-to-face meeting. (Mot., Exh. A-7, email from Plaintiff dated October 5, 2005 at 2:29 p.m.). (Id.) Toward the end of the email, Plaintiff also expressed her dissatisfaction with being "under a constant magnifying glass" and told Stroup that "Victoria is a shining star in a lot of people's eyes" but that "she has it out for me and I know it." Plaintiff also complained, "It was apparent when she [Victoria Triplett] came in on her first shift back that she had an attitude toward me . . ." (Id.) In a response to this meeting and the email, Stroup responded to Plaintiff that he would like to get "together to help make your situation at CMAFS better." (Mot., Exh. A-7, email from David Stroup dated October 7, 2005 at 18:56:05).

In early December 2005, O'Neil, Plaintiff's CSC supervisor, met with Plaintiff regarding several policy violations she had committed and her general

work performance. (Compl. at 3). After meeting with Plaintiff on December 8, 2005, O'Neil generated a form HRMP 207 Violations. (Mot., Exh. A-10). Among the violations noted was that Plaintiff did not complete a timecard prior to deadline and that when confronted about it, "you [Plaintiff] noted to personnel
on the operations floor that filling out your timecard was not a priority, and you were tired of Ms. Gutierrez bothering you." (Id.) Further, the HRMP noted, "It was reported that you slept several hours the night of December 1st and morning of September [sic] 2nd. Sleeping on the job is not an acceptable practice per CSC policy." (Id.)Finally, the HRMP noted, "It has been reported that you leave early, as much as 30 minutes prior to completing your shift. In addition you fail to fill out your timecard on a daily basis often leaving it blank until submittal day." (Id.) Also included in the HRMP were action plans to correct these violations. (Id.) During the face-to-face meeting with O'Neil, Plaintiff admitted, "Okay. Maybe I dozed off, but it won't happen again. I'm sorry." (Mot., Exh. A-2, Deposition of Plaintiff, at 159). O'Neil followed up on the meeting with Plaintiff with an email confirming their discussion of December 8, 2005, "specifically you [sic] recent violations of HRMP 207 as it relates to paragraph 3.1.2, 3.2.10 and 3.1.16. Please work to avoid any future violations." (Mot., Exh. A-8, email from Kenneth O'Neil dated December 8, 2005 at 13:44:17). Following this meeting with Plaintiff, O'Neil sent an

email to Stroup on December 16, 2005 with a directive to "distribute to all" instructing that sleeping on the job was not condoned by CMAC, ISC2 nor ISC2 program management. (Mot., Exh. A-9). On or about February 1, 2006, it was alleged Plaintiff was sleeping during working hours once again. (Mot. UF 18; Rsp. accord). On February 3, 2006, Plaintiff learned that
O'Neil was conducting an investigation in relation to the report of Plaintiff sleeping during working hours. (Mot. UF 18; Rsp. 18-19; Mot., Exh. A-2 Deposition of Plaintiff at 168; Mot., Exh. A-8, email from Plaintiff to Bill Smith, dated February 8, 2006). After Plaintiff learned that O'Neil was conducting an investigation, Plaintiff contacted CSC employee Jason Brown and asked him not to tell O'Neil if he had witnessed her "dozing off." (Mot., Exh. A-2, Deposition of Plaintiff at 183-185). On February 7, 2006, O'Neil contacted Plaintiff to schedule a meeting; the meeting was arranged for February 9, 2006. (Mot. Exh. A-8, email from Plaintiff to Smith dated
February 8, 2006). As a result of learning that O'Neil was investigating Plaintiff with respect to her allegedly sleeping on the job, Plaintiff admits that "in response" she contacted CSC's Employee Relations Department to complain of "discrimination and harassment by O'Neil." (Mot. UF 20; Rsp. accord4). Plaintiff made this complaint "after she became aware she was to be disciplined in an attempt to protect herself, since she feared her termination was

imminent." (Rsp. at ¶ 20). In relation to her complaint against O'Neil, Plaintiff stated that "It is also my observation that people who work night shift have a tendency to doze off. Not that I am making an excuse for this, however, this is something that has been going on for years." (Mot., Exh. A-8). During the meeting between O'Neil and Plaintiff on February 9, 2006, O'Neil counseled Plaintiff regarding sleeping on the job again, and her continued timekeeping problems. The parties do not dispute that "during this meeting O'Neil made it clear to Plaintiff that the counseling [meeting] related to her admitted, established performance issues, and did not concern her interpersonal issues with non-CSC employees Johnson and Triplett." (Rsp. at ¶22; Mot. accord). At the conclusion of the meeting, O'Neil told Plaintiff he would give her one more chance and refrain from issuing a letter of reprimand, known at CSC as a Letter of Caution. (Mot., Exh. A-12, email from Kenneth O'Neil to Plaintiff, dated February 15, 2006).

4 The court notes that Plaintiff claims in her Response for the first time that her complaint against O'Neil for harassment was her "second" complaint against O'Neil. Exhibit A-8, the email to Bill Smith in Employee Relations, was generated after O'Neil called Plaintiff to set up the meeting. However, Exhibit A-8 begins, "Per our conversation here is what you have
requested." From that the court will infer, for the benefit of Plaintiff, the non-movant herein, that an

oral conversation with Mr. Smith regarding a complaint of harassment against Mr. O'Neil may have been undertaken before O'Neil contacted Plaintiff to set up the February 9, 2006 appointment. In any event, it is undisputed that the contact with CSC Employee Relations was undertaken after February 3, 2006 when Plaintiff first learned of O'Neil's investigation into allegations of Plaintiff sleeping on the job. (Mot., Exh. A-2, Deposition of Plaintiff at 168). Shortly after this meeting, Plaintiff filed harassment complaints against Johnson and Triplett5 with their respective employers, BAE and Boeing. (Rsp. at 23; Mot. accord; Mot., Exh. A-11, email from Plaintiff to Doug Fish dated February 9, 2006 at 10:00 p.m.).

On February 14, 2006, when O'Neil learned that Plaintiff had filed the complaints against Johnson and Triplett, he issued a Letter of Caution against Plaintiff even though he had told her he would not do so. (Mot., Exh. A-12, email from Kenneth O'Neil to Plaintiff dated February 15, 2006; Mot., Exh. A13, Letter of Caution). O'Neal stated, "The day following our meeting, you issue (sic) two complaints against personnel in these work centers in an effort to divert attention from your problem. Since you violated our agreement, I chose to issue the letter." (Id.) That same day, Plaintiff filed a complaint against O'Neil for retaliation. (Compl. at 4; Mot. accord ¶ 30).

On February 15, 2006 Plaintiff sent an email to Human Resources stating she would not sign the Letter of Caution. (Mot., Exh. 16, email from Plaintiff dated February 15, 2006 at 2:57 a.m.). On that same day, approximately 12 hours later, O'Neil attended an "Operations Management Meeting" with Lockheed Martin, CSC's customer on the Contract. (Mot. ¶ 36; Rsp. accord on this issue). On February 16, 2006, Lockheed Martin issued a directive to CSC directing "CSC to remove CMAC DBA Staff member (Silvia Cook) from the ISC2 program immediately." (Mot., Exh. A-19). Thereafter O'Neil removed Plaintiff from the Contract and terminated her employment on February 23, 2006. (Mot. ¶ 38; Rsp. accord).

5 The parties apparently do not dispute that a complaint was filed with Boeing by the plaintiff against Triplett, however no evidence of that complaint was submitted to the court.

LEGAL STANDARDS

A. Summary Judgment

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2006); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); Concrete Works, Inc. v. City & County of Denver, 36 F.3d

1513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." Concrete Works, 36 F.3d at 1518 (citing Celotex, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324; see Fed. R. Civ. P. 56(e) (2006). A fact in dispute is "material" if it might affect the outcome of the suit under the governing law; the dispute is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. Allen v. Muskogee, 119 F.3d 837, 839 (10th Cir. 1997) (citing Anderson, 477 U.S. at 248). The court may consider only admissible evidence when ruling on a summary judgment motion. See World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir. 1985). The factual record and reasonable inferences there from are viewed in the light most favorable to the party opposing summary judgment. Byers v. City of Albuquerque, 150 F.3d 1271, 1274 (10th Cir. 1998) (citing Concrete Works, 36 F.3d at 1517).

B. Pro Se Plaintiff

The court notes at the outset that because Plaintiff appears pro se, the court "review[s] h[er] pleadings

and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." Trackwell v. United States, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). See also Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (holding allegations of a pro se complaint "to less stringent standards than formal pleadings drafted by lawyers"). However, a pro se litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). See also Whitney v. New Mexico, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); Drake v. City of Fort Collins, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues").

C. Title 42 U.S.C. § 2000e, et seq., ("Title VII")

1. Discrimination

"Title VII prohibits an employer from terminating any individual because of 'race, color, religion, sex, or national origin,'" 42 U.S.C. 2000e2(a)(1). In Title VII cases, the inquiry is whether defendant

intentionally discriminated against Plaintiff based on protected class characteristics. Jones v. Denver Post Corp., 203 F.3d 748, 752 (10th Cir. 2000). If a plaintiff offers no direct evidence of discrimination, her claims must be analyzed under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Young v. Dillon Cos., Inc., 468 F.3d 1243, 1249 (10th Cir. 2006). Under McDonnell Douglas, the plaintiff bears the burden of establishing a prima facie case of racial or gender discrimination based on indirect or circumstantial evidence. Young at 1249. Under that analysis, the "not onerous" burden of establishing a prima facie case is placed upon the plaintiff who must show by a preponderance of the evidence, that: (1) she belongs to a protected class; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (3) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Somoza v. University of Denver, 2006 WL 2535092 (D. Colo. 2006). "[E]stablishing a prima facie case 'creates a presumption that the employer unlawfully discriminated against the employee'. . ." McCowan v. All Star Maintenance, Inc., 273 F.3d 917, 922 (10th Cir. 2001) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

If the plaintiff can satisfy this threshold requirement, the burden shifts to the employer "to rebut the presumption of discrimination by

producing evidence the termination was based on a legitimate, nondiscriminatory reason. "The explanation provided must be legally sufficient to justify a judgment for the defendant . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.'" Id. (quoting Burdine, 450 U.S. at 255-56). The Tenth Circuit has stated that in determining whether a particular defendant has met its burden of coming forward with facially legitimate, nondiscriminatory reasons for the employment actions, [t]he defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the [action]; the defendant does not at this stage of proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion However, the proffered reason for the action taken against the minority employee must be reasonably specific and clear. EEOC v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992) (citations omitted).

Thereafter, if the employer meets its burden, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered justification is pretextual. Id. This burden-shifting analysis applies both to Title VII and § 1981 claims. See Perry v. Woodward, 199 F.3d 1126, 1135 (10th Cir. 1999). The plaintiff must demonstrate that "the proffered reason [for the adverse employment action] is not the

true reason either directly by showing a discriminatory reason more likely motivated the employer or indirectly by challenging the employer's reason as unworthy of credence." McCowan, 273 F.3d at 922 (citing Burdine, 450 U.S. at 256). A plaintiff's bald assertions to the contrary do not amount to proof that a company's given reason for terminating an employee is not the genuine motivating reason for the adverse action. See Rolland v. Primesource Staffing, LLC, 2007 WL 4205871, *4 (10th Cir. 2007); Reynolds v. Sch. Dist. No. 1, 69 F.3d 1523, 1535 (10th Cir. 1995). "If the defendant is able to articulate a valid reason, the plaintiff can avoid summary judgment 'only if [she] is able to show that a genuine dispute of material fact exists as to whether the defendant's articulated reason was pretextual.'" Perry v. Woodward, 199 F.3d 1126, 1135 (10th Cir. 1999) (emphasis added).

There are typically three ways that a plaintiff makes a showing of pretext: (1) with evidence that the defendant's stated reason for the adverse employment action was false; (2) with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances; or (3) with evidence that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff. Kendrick v. Penske Transp. Servs, Inc., 220 F.3d 1220, 1230 (10th Cir. 2000). A plaintiff who wishes to show that

a company acted contrary to an unwritten policy or to company practice often does so by providing evidence that she was treated differently from other similarly situated employees who violated work rules of comparable seriousness. (Id.) "[A] challenge of pretext requires a court to look at the facts as they appear to the person making the decision to terminate, not the aggrieved employee." Piercy v. Maketa, 480 F.3d
1192, 1200 (10th Cir. 2007) (emphasis added); Green v. New Mexico, 420 F.3d 1189, 1191 n. 2 (10th Cir. 2005); Kendrick v. Penske Transp. Servs., 220 F.3d 1220, 1231 (10th Cir. 2000). "The relevant inquiry is not whether [their] proffered reasons were wise, fair or correct," but rather we ask whether they believed those reasons to be true and "acted in good faith upon those beliefs."
Rivera v. City and County of Denver, 365 F.3d 912, 924-25 (10th Cir. 2004) (quoting Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1318 (10th Cir. 1999)). Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision. EEOC v. Flasher Co., 986 F.2d 1312, 1322 n. 12 (10th Cir.1992). Accordingly, a company's good faith "perception of the employee's performance . . . is relevant, not plaintiff's subjective evaluation of [her] own relative performance." Piercy at 1201.

2. Hostile Work Environment

A hostile work environment claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice." 42 U.S.C. § 2000e-

5(e)(1). "Workplace conduct is not measured in isolation " Clark County School Dist. v. Breeden, 532 U.S. 268, 270 (2001) (per curiam). Thus, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII
is violated." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)). Hostile work environment claims based on racial or gender harassment are reviewed under the same standard as individual discrimination as noted in subsection (1) above. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66-67 (1986).

3. Retaliation

To succeed on a claim of retaliation a plaintiff must show: "(1) that [s]he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." Haynes v. Level 3 Communications, LLC,
456 F.3d 1215, 1228 (10th Cir. 2006); Argo v. Blue Cross & Blue Shield of Kan., Inc., 452 F.3d 1193, 1198 (10th Cir.2006) (citing Burlington N. & Santa Fe Ry. Co. v. White, — U.S. — , 126 S. Ct. 2405 (2006). These three requirements must be satisfied in the summary judgment context by demonstrating

the initial prima facie showing. Nwagbologu v. Regents of University of New Mexico, 2002 WL 532430, *2 (10th Cir. 2002); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 533 (10th Cir. 1998).

As with discrimination claims, if the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a non-retaliatory reason for the adverse employment action. If the employer satisfies this burden, then, in order to prevail on her retaliation claim, the plaintiff must prove that the employer's articulated reason for the adverse action is pretextual. Piercy v. Maketa, 480 F.3d 1192, 1198 (10th Cir. 2007); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1177 (10th Cir. 1999).

"A retaliatory motive may be inferred when an adverse action closely follows protected activity. Temporal proximity allows for a presumption of causation in the prima facie setting. Hysten v. Burlington Northern & Santa Fe Ry., 296 F.3d 1177, 1183-84 (10th Cir. 2002). However, if the only evidence of causation is a temporal relationship, then the adverse action must occur closely following the protected activity. For example, an adverse employment action that happened more than three months after the protected activity was not entitled to a presumption of causation. Id.; Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (noting a three-month separation did not destroy any causal connection but simply failed to establish by itself such a connection). Unless the termination is

very closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." Anderson, at 1179; see also O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001).

ANALYSIS

A. Discrimination Claims

1. Prima Facie Showing of Discrimination.

Plaintiff Dean alleges that her termination came about as a result of her employer's discrimination against her because of her race, gender or color. Therefore, her Complaint, together with the other submissions to date, must establish that she belongs to a protected class, in this case a racial minority and she is female, that she was qualified for the position from which she was terminated, that she suffered an adverse employment action and that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Unfortunately, Plaintiff cannot meet her initial burden of going forward with her discrimination claims. It is undisputed that Ms. Dean is a black female and therefore is a member of several protected classes. Additionally, it is also not disputed that she was terminated from her position with CSC, which is an adverse employment action. However, the evidence does not establish either that she was qualified for her position or that her termination occurred under circumstances giving rise to an inference of discrimination.

Plaintiff was on notice that her employer was dissatisfied with her job performance as early as December 2, 2004 when O'Neil, her supervisor, would not give her a raise in pay, told her that her attention to detail was lacking and advised her that she did not complete the job paperwork in an adequate manner. (Mot., Exh. A-6). Thereafter, Plaintiff acknowledges she continued to have performance issues concerning her MSL entries required for her position and that other personnel on the same contract team were constantly watching her and noting deficiencies in her job performance. Plaintiff characterizes this scrutiny as "harassment," however it is clear that her job performance was being closely monitored and found repeatedly lacking by members of the team charged with ensuring that all jobs were being performed satisfactorily. Ten months after her initial advisement by O'Neil that her work was not up to par,
the plaintiff was complaining to Stoup that Johnson and Triplett were being overly critical of her job performance and she admitted that for various reasons her MSL entries continued to be deficient. (Mot., Exh. A-7).

In December of 2005 she was reprimanded for falling asleep on the job and when she complained that others were also sleeping during working hours, O'Neil sent a company-wide email to all employees emphasizing that sleeping on the job was a violation of company policy and would not be tolerated. (Mot., Exh. A-8). In spite of this, in early February, 2006,

Plaintiff was accused of sleeping on the job again. Also in December, 2005, O'Neil discussed other performance issues with Plaintiff Dean including leaving early from her shifts and not completing her time card records in a timely fashion. In fact, at that time Plaintiff and O'Neil agreed on an action plan to correct these deficiencies. (Id.). It appears from the undisputed facts that Plaintiff has not made a prima facie showing that she was qualified for the job she held. In fact, it appears that for various personal reasons, Plaintiff was not qualified for the job - because of her family responsibilities and her second full time job she appeared to be unable to stay awake during her shift and continually "dozed off" in spite of specific warnings and instructions that such behavior violated company policy and practice.

After the plaintiff had been counseled repeatedly over a fourteen month period

concerning her job performance deficiencies, she was finally terminated on February 23, 2006. As grounds to support her allegations that this termination was effectuated because of her race, color or gender and not because of her job performance, Plaintiff's sole and only allegation of any discriminatory conduct occurring during the entire time of her employment was that on between two and five occasions a non-CSC employee made certain comments to her.

The Complaint contains no allegations of any derogatory statements concerning race, gender or color made by any person employed by CSC, or anyone working on the Lockheed Martin contract

during the period of her employment. (Compl.) In her deposition, Plaintiff stated that on approximately "two or three, four or five" occasions Jake Johnson, a BAE
employee working on the Lockheed Martin contract, made comments which she considered to be offensive and related to either her gender or race or color, such as: - "How can you afford to live in a high-end neighborhood and drive a nice car when I can't do that?" (Mot, Exh. A-2, deposition of Sylvia Dean, 115:9-12); or- "How can your husband not work? You must be doing something else." (Id. at115:12-13); or- "A woman is supposed to be home with her kids. Why are you working two jobs?" (Id. at 232:12-14); or- "You shouldn't be working two jobs. You should be taking care of the kids.Your husband should be . . ." (Id. at 232:23-22); or-

"You've got that nice car. What are you doing on the side? What does your husband do on the side? He doesn't work. What does he do?" (Id. at 241:21-24).

It is undisputed that Plaintiff did not make complaints about these comments at any time during her employment with CSC, BAE, Boeing or Lockheed Martin. (Rsp. ¶ 42; Mot. accord; Mot., Exh. A-2, deposition of Plaintiff at 242:19-20). Plaintiff admits she never heard O'Neil or any CSC employee make any comment whatsoever or statements about Plaintiff's gender or
race. (Mot., Exh. A-2 at 248:7-10). Plaintiff does not know of any other person at CSC who was

discriminated against on the basis of gender or race. (Id. at 19-24). Plaintiff alleges that the comment concerning other sources of income is racial in nature, however, this court does not see anything at all either racially discriminatory or discriminatory as to gender about this comment. The comment, assuming as I must for purposes of this recommendation that the comment was actually made by Johnson, might well be rude, offensive or judgmental, however that does not make it prohibited under Title VII. The plaintiff admits she never heard any comment, statement, joke or other discriminatory remark made about her or anyone else by any CSC employee that even remotely related to her race, color or gender. This court agrees with the defendant that the plaintiff has not established a prima facie case for her claim of racial or gender discrimination because she has made no showing that any of the defendants' actions occurred under circumstances giving rise to an inference of discrimination. Simply put, Plaintiff has not submitted any evidence that she was treated any differently than any non-protected class employees at CSC and her conclusory allegations of discrimination, without more, are insufficient to create a genuine issue of material fact that would defeat defendants' summary judgment motion on her discrimination claims. Annett v. University of Kansas, 371 F.3d 1233, 1237 (10th Cir. 2004).

2. Legitimate, Nondiscriminatory Motive for Employment Action

Further, even if it were to be held that Plaintiff has met her admittedly low burden concerning a prima facie showing of discrimination, the defendant has presented ample evidence that her termination was based on a legitimate, nondiscriminatory reasons.

The plaintiff argues that others on her job team were being overly critical of her and that her substandard work performance should be excused since she had numerous personal issues occurring over the time period. "It is the manager's perception of the employee's performance that is relevant, not Plaintiff's subjective evaluation of his own relative performance" when analyzing a claim of pretext for an adverse employment decision. Furr v. Seagate Tech., Inc., 82 F.3d 980, 988 (10th Cir. 1996).

The plaintiff herself admits to most of the shortcomings in her conduct, but minimizes their importance in the context of her overall job performance. There were several "write-ups" and counseling over the course of Plaintiff's employment with CSC and the company found a need for constant close monitoring of Plaintiff's job output. As noted above, and in the undisputed facts section of this Recommendation, CSC counseled Plaintiff on what it perceived to be numerous workplace violations and substandard performance in her job for a period of fourteen months before finally terminating her employment. "[P]laintiff's 'mere conjecture that [her] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.' " Panis v. Mission Hills Bank,

N.A., 60 F.3d 1486, 1491 (10th Cir. 1995) (quoting Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988)); Jones, at 754.

This court finds that CSC has established legitimate, non-discriminatory motives for its employment action.

3. Pretext

Finally, even if the plaintiff had established a prima facie case of discrimination in the first instance, since the defendant was able to establish rational and reasonable work related grounds for its termination decision, the burden would shift back to the plaintiff to demonstrate that the defendant's proffered justification is pretextual

To establish pretext, a plaintiff must show either that "a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256 (emphasis added). A plaintiff can show pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir.1997); Nwagbologu at *2.

Plaintiff has presented no evidence that the actions undertaken by the company during the course of her employment were pretextual. In spite of classifying her only as an average worker and noting

deficiencies in one of the most important aspects of her job, her MSL entries, the company continued to counsel the plaintiff and work with her on action plans to improve her job performance over a fourteen month time period. Plaintiff Dean has not brought forth any discriminatory reason for her termination6 nor has she established that the company acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances. In fact, several months before she was terminated, O'Neil generated a form HRMP 207 outlining several non-compliance issues and violations by Dean which also included a written plan for improvement in those area. Likewise, Dean has not produced any evidence that the defendant acted contrary to an unwritten policy or contrary to company practice with respect to her termination. Her only claim of being treated differently from other similarly situated employees was that on her first "write-up" about sleeping on the job, she acknowledged that the behavior was contrary to company policy but she complained that others also slept on the job. In response, O'Neil sent out a company-wide directive reminding all employees that sleeping on the job was a prohibited practice. Within approximately one and one-half months, Plaintiff was reported as sleeping on the job again, in spite of O'Neil's warnings to all company employees.

This court again agrees with the defendant that Plaintiff has submitted nothing to establish a genuine issue of material fact that the basis for her

termination of employment was pretextual. In fact, undisputed documents and facts show that Plaintiff was subject to dismissal for violations of company policy and her own poor job performance.

6 The retaliation claim will be addressed in this Recommendation, infra.

B. Hostile Work Environment

In determining whether an actionable hostile work environment claim exists, courts will look to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." National R.R.
Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002).

As set forth herein, there are no facts supporting any claim of hostile work environment. There is no series of discriminatory acts which affected the plaintiff. Indeed there was very close watch over her work product and performance; whether the plaintiff believes such scrutiny was justified or not, is not the point. There is simply no evidence that it was motivated by an
improper consideration. At the absolute most, there were between two to five "offensive utterances" made by a person who did not work for CSC over the entire course of Plaintiff's twenty-three months of employment.

On the undisputed facts, there is no evidence that the CSC workplace was permeated with 'discriminatory intimidation, ridicule, and insult,' at all, much less that rose to the level of an abusive working environment.

C. Retaliation

1. Prima Facie Case

Plaintiff alleges that the issuance of the Letter of Caution by O'Neil and her termination several days later was in retaliation for Plaintiff's filing of complaints against O'Neil, Johnson and Triplett with their respective companies alleging discrimination.

In order to state a prima facie case of retaliation, Dean must present evidence to show that she engaged in protected opposition to discrimination, that a reasonable employee would have found the challenged action materially adverse, and that a causal connection existed between the protected activity and the materially adverse action. As noted herein, Plaintiff is entitled to a presumption of causal connection if there is sufficient temporal proximity between the adverse action and the protected behavior.

Sometime between February 3, 2006 and February 7, 2006, the plaintiff filed a complaint against O'Neil for "discrimination and harassment." The plaintiff admits she filed this complaint "in response" to learning that O'Neil was investigating the allegation that Plaintiff had been sleeping on the job again "after she became aware she was to be disciplined in

an attempt to protect herself, since she feared her termination was imminent." (Rsp. at ¶ 20). This is not, in this court's opinion "protected activity" since no one has the right to file false discrimination complaints against another simply as a defense to being reprimanded for on-the-job failures. The meeting between Dean and O'Neil proceeded on February 9, 2006 and the parties do not dispute that the meeting concerned only the allegations that she had been sleeping on the job again and her continued time keeping and reporting infractions. At the conclusion of the meeting, O'Neil told the plaintiff she would not be formally reprimanded by a Letter of Caution. After the meeting, on February 9, 2006, Plaintiff filed complaints against Johnson and Triplett for discrimination and harassment with their respective companies. As noted herein, Plaintiff
had complained previously about what she characterized as continued harassment by Johnson and Triplett. (October 5, 2005 email to Dave Stroup, Mot., Exh. A-7). The court finds that the filing of the complaints against Johnson and Triplett was protected activity.

7 Five days later, on February 14, 2006, Mr. O'Neil issued a Letter of Caution to the plaintiff in spite of having agreed not to do so on February 9, 2006. In a written correspondence to Plaintiff, O'Neil stated after learning Plaintiff had filed discrimination complaints that he considered her filing of the complaints to be in violation of their agreement gave

that as the reason why he issued the Letter of Caution. Plaintiff then filed a claim of retaliation against O'Neil. This, too, was protected conduct.

The very next day, on February 15, 2006, O'Neil attended an "Operations Management Meeting" with the client of the CSC contract, Lockheed Martin, and apparently discussed Sylvia Dean. One day later, February 16, 2006, Lockheed Martin issued a directive to CSC to remove Plaintiff from the program immediately. O'Neil then removed her and she was terminated on
February 23, 3006.

Clearly, Plaintiff has made a sufficient prima facie case of retaliation. She engaged in protected activity and a few days later O'Neil, by his own written admission, retaliated against her by issuing the Letter of Caution, something he had agreed not to do. Within a period of hours following her complaint against O'Neil, Lockheed Martin had been persuaded to issue a letter demanding that Plaintiff be removed from their contract and she was terminated approximately one week later.

7 Whether the complaints were ultimately successful is irrelevant in the retaliation
context.

2. Legitimate, Non Discriminatory Motivation

In response to Plaitniff's prima facie showing, the defendant is entitled to offer a "legitimate, nondiscriminatory reason for the adverse

employment action." O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir.2001).

Without repeating the facts of this case ad nauseam, it is clear that CSC had valid, legitimate and non-discriminatory motives to terminate Dean. It is also true that O'Neil issued the Letter of Caution in direct retaliation for Plaintiff's filing discrimination complaints against Johnson and Triplett. Warning letters and reprimands can be adverse employment actions. Medina v. Income Support Div., 413 F.3d 1131, 1137 (10th Cir.2005). "A reprimand, however, will only constitute an adverse employment action if it adversely affects the terms and conditions of the plaintiff's employment-for example, if it affects the likelihood that the plaintiff will be terminated, undermines the plaintiff's current position, or affects the plaintiff's future employment opportunities." Tapia v. City of Albuquerque, 2006 WL 308267, *4 (10th Cir. 2006)

The Letter of Caution did not affect Dean's pay or benefits. Id.; Heno v. Sprint/United Mgmt. Co., 208 F.3d 847, 857 (10th Cir.2000). The fact that the Letter of Caution indicates that Dean could be disciplined for a future incidents of sleeping on the job and failure to properly complete job paperwork is not enough to conclusively determine that the letter itself was a

disciplinary action. In fact, the Letter on its face suggests that Plaintiff contact the CSC Life Management Program to help with "personal

matters" and offers to assist the plaintiff "in meeting these objectives."

What remains a material disputed fact, however, is whether O'Neil took that letter - or information about its issuance and contents - to Lockheed Martin the day after it was issued and used that as a basis for persuading them to ask for Plaintiff's removal from the project and, if so, what his motivations were in so doing. The temporal proximity between the time the Letter of Caution was issued and Lockheed Martin requested she be removed from the contract suggests that a retaliatory motive precipitated advising Lockheed Martin about Plaintiff's continuing and noted performance issues. It was this advisement which directly caused the plaintiff to be terminated at that time.8

3. Causal Connection

The undisputed record and evidence before this court shows that CSC had been cognizant and forthright about deficiencies in Dean's work performance. In fact, Plaintiff on several occasions noted that she felt her work was being closely monitored and that she was being criticized. What appeared to Ms. Dean as criticism, however, appears to this court as a reasonable effort, over a period encompassing 60% of the entire time of Plaintiff's employment, to point out problems and issues she was having with her work and give her an opportunity to correct errors and improve in her job. Again, in several pieces of correspondence occurring

8 At trial, if Plaintiff proves that O'Neil and CSC harbored a retaliatory intent, given the obvious "mixed motive," CSC will be able to attempt to prove the "same decision" affirmative defense. See 42 U.S.C. § 2000e-5(g)(2)(B) (codifying "same decision" defense). CSC could avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision without the retaliation motive. Vialpando v. Johanns, 2008 WL 410369, *5 (D.Colo. 2008). Again,.however, this is an issue for the jury, not for this court on summary judgment.

during the relevant time period, Plaintiff acknowledges that her performance could stand improvement but offers a multitude of excuses for why she is sleeping, not filling out her paperwork, not correctly or adequately doing MSL docketing and not keeping accurate time records. Finally, knowing that she was facing discipline once again from O'Neil for the report of sleeping during duty hours, Dean asks another employee not to report her for the conduct.

However, as set forth above, Plaintiff did engage in protected activity when she filed complaints against Johnson and Triplett on February 9, 2006. The fact that she filed the complaints against these non-CSC employees was the self-admitted reason O'Neil issued the Letter of Caution. Even though this court finds that based on the evidence in the case there is no genuine issue of material fact in dispute that would lend a reasonable

person to conclude that
Dean's termination was based on either her race, gender or color, it remains in dispute whether her actual termination in February, 2006, came as a result of her performance issues or because she angered O'Neil by engaging in protected activity.

The causal connection between Dean's protected activity of filing complaints alleging discrimination against Johnson, Triplett and O'Neil and her termination from employment by CSC at that particular moment in time remains a dispute which cannot be resolved on summary judgment, but rather remains a genuine issue for trial.

Wherefore, based on the foregoing it is this courts RECOMMENDATION

That Defendant's Motion for Summary Judgment [Doc. No. 38] be GRANTED in part and DENIED in part.

1. It is RECOMMENDED that Plaintiff's claims for discrimination and
hostile work environment be DISMISSED.

2. It is also RECOMMENDED that Plaintiff's claim for retaliation be
allowed to proceed to trial.

ADVISEMENT TO THE PARTIES

Within ten days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of

Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); In re Griego, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for de novo review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar de novo review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. See Vega v. Suthers, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation de novo despite the lack of an objection does not preclude application of the "firm waiver rule"); One Parcel of Real Property, 73 F.3d at 1059-60 (a party's objections to the Magistrate Judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the District Court or for appellate review); International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc., 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate

Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); Ayala v. United States, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). But see, Morales-Fernandez v. INS, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

/s



Dated this 25th day of February, 2009.

BY THE COURT:

Kathleen M. Tafoya

United States Magistrate Judge

From: O'Neil, Kenneth W (N-DynCorp)

Sent: Tuesday, February 21,2006 9:01 AM

To: O'Neil, Kenneth W (N-DynCorp)

Subject: another FW: Letter of Caution

From: Cook Sylvia G Ctr 721 CS/SCEOMO [mailto:Sylvla.Cook.ctr@cheyennemountaln.af.mil]
Sent: Wednesday, February 15, 2006 10:53 PM

To: O'Neil, Kenneth W (N-DynCorp) Cc: lsweriin@csc.com

Subject: RE: Letter of Caution

Ken,

This was by no way an effort to divert attention from my problem.

I in fact stated to you in our meeting that I intended to file complaints against Jake and Victoia, to which you had no response except for the fact that I did indeed doze off. There was never an agreement made that had the condition of me not getting the letter as long as I do not proceed with filing complaints against people harassing me. The agreement I remember was that I would address my problem with the sleeping. You mentioned that you would check in and if

I in fact was sleeping I would be walked out. My time entry was not mentioned in a negative way and in fact you stated that you were impressed with the improvement of my time entries.

I am now in receipt of the "Letter of Caution" and I take full responsibility for my faults.

I would like to work on these problems without having further distractions.

However, the issue still remains that I have tried to ile complaints and

Jake's manager mentioned that I had to ile that complaint formally

through my management I received no response from Victoria's manager as of yet.

You are fully aware of my situation with Jake and Victoria and we in fact discussed this in our meeting. The issue was discussed in our December meeting as well. I also discussed
this with my immediate supervisor in October. So prior to any of this I had made
claims of being singled-out, discriminated against and harassed and this was not addressed.
So therefore, your suggestion of my diverting attention to another issue to avoid my problem in invalid because I have continued to work in a hostile enviroment where i knew I was being retaliated against. But the issue still remains that I feel discriminated against and harassed in the workplace. I thought Tuesday's meeting was to address this issue as you stated on the phone when
I questioned you on the reason for this meeting. You stated that this was related to
"My complaint about Jake". This still remains an issue and only getting worse as
I feel I am being singled-out, retaliated against and

there is increased surveillance
based on my complaints.

Thanks,

Sylvia

From: O'Neil, Kenneth W (N-DynCorp)
[mailto:kenneth.w.o'neil@lmco.com]

Sent: Wednesday, February 15, 2006 10:17 AM To:
Cook Sylvia G Ctr 721 CS/SCEOMO

Cc: lsweriin@csc.com

Subject: RE: Letter of Caution

11/20/2007

Sylvia,

When we spoke, I did in fact mention that I was going to give you one more chance and refrain

from issuing the letter. We agreed that sleeping on the job, and failure to complete your timecard on a daily basis was between you and me and not others within the work center. The day following our meeting, you issue two complaints against personnel in these work centers in an effort to divert attention from your problem. Since you violated our agreement, I chose to issue the letter.

Ken.

From: Cook Sylvia G Ctr 721 CS/SCEOMO [mailto:Sylvia.Cook.ctr@cheyennemountain.af.mil] Sent: Tuesday, February 14, 2006 9:04 PM

To: O'Neil, Kenneth W (N-DynCorp) Subject: RE: Letter of Caution

We never spoke about this last week. In fact, you told me I would not be written up. But I have nothing more to say on this issue. I was not aware of a Letter of Caution until today.
I was not sure what prompted the HR meeting today, but thanks for providing me the information.
I choose not to sign.

Have a good night. Sylvia

From: O'Neil, Kenneth W (N-DynCorp) [mailto:kenneth.w.o'neil@lmco.com] Sent: Tuesday, February 14, 2006 12:11 PM

To: cook_compaq@hotmail.com; Cook Sylvia G Ctr 721 CS/SCEOMO Subject: Leter of Caution

Sylvia,

Enclosed is the letter of caution we spoke about last week. As outlined in the letter, you can sign or choose not to sign the choice is yours. Please let me know what you intend to do.

«Sylvia Cook Sleeping LOC.doc»

Ken.

Kenneth W. O'Neil .

Computer Sciences Corporation (CSC) Work 719-277-5449

Cell 719-440-2824

11/20/2007

CSC 00150

From: O'Neil, Kenneth W (N-DynCorp)

Sent: Tuesday, February 21, 2006 8:55 AM

To: O'Neil. Kenneth W (N-DynCorp)

Subject: New FW: MSL12783 - Intenal

From: Stroup David M Ctr 721CS/SCEOM [mailto:David.Stroup.ctr@cheyennemountain.af.mil] Sent: Friday, February 17,2006 8:14 AM

To: O'Neil, Kenneth W (N-DynCorp) Subject: FW: MSL 12783 - Intenal

From: Cook Sylvia G Ctr 721 CS/SCEOMO Sent: Fiday, February 17, 2006 7:00 AM To: Stroup David M Ctr 721 CS/SCEOM

Cc: Robinson James F Ctr 721 CS/SCEOMO; Triplett Victoria A Ctr 721 CS/SCEOMO; Johnson Jake E Or 721 C5/SCEOMO

Subject: RE: MSL 12783 - Internal

Dave,

This is a request to you.

I have replied to Jim concening this and have not received a reply. I would like to get a reply in lieu of recent events.

This is nothing new to me as I have been scrutinized for log entries for some time. And everything else for that matter. This is a direct attack on me.
As you know I approached all sides of this when I spoke to you about
my issues. It remains a hostile work environment and that is
simply because these three best of friends choose to buddy up on
me and then no longer report to you, but directly to Ken. My concen
is that before any of this became an issue, it should have been
addressed and now if s to the point where it is out of control. I refrain rom
comment and descriptive detail on anything I say here any more because
my comments are consistently scrutinized and my logs are constantly
monitored. I would love to see how many emails or complaints have

been addressed to anyone other than myself. In my review of logs I have noticed negative commentary being placed in there. I have noticed that JR consistently places comments in VATs MSL on things, however, he

does not do so everywhere. I notice that VAT povided no negative

comments in anybody else's log entry, except for mine. I a | so see that each and every time I have been on shift related to her she has
provided comment on how many days things have been in the logs.
I am not pointing the finger here, but I have also noticed some additions/ adjustments being made to my enties to make them look CRITICAL Perhaps you should tell me if this is the environment that anyone should live in. In conversation with workers in the CMAC,
no one else has experienced this but me. When I C3lled you the
other day I questioned if you had received any complaints from
the Military concening me. Ken stated this to be the issue and ,
I am not sure why they would bypass you to go directly to him.
Well, I have been advised that Day staff

Is out to get me and all activities are being moniored and documented.

I am not sure if you are aware that this is retaliation in its worst form.

As a supervisor and a person who is in charge of these people I wouldn't think that you would allow such activity to continue.

As a professional in a in a working environment I would expect my co-workers

to be professional as well. If these people believe that singling me out only

effects me they are wrong. My co-workers are directly affected and it is unfair

to them and me. This type of behaviour also directory reflects on the contract as a whole. This behaviour has been going on since around 10/2004. I have endured all I can and taken all steps to resolve. Again, I am asking that it stop or be equally distributed if
It is appropiate pratice.

11/20/2007

CSC 00152

From: Robinson James F Ctr 721 CS/SCEOMO

Sent: Wednesday, February 15, 2006 12:11 PM

To: Gannon Edward A Ctr 721 CS/SCEO; Cook Sylvia G Or 721 CS/SCEOMO

Cc: Stroup David M Ctr 721 CS/SCEOM

Subject: MSL 12783 • Intenal

MSL 12783 should have been addressed on shift Basically, the idea of open item is that you ran out of time. Exhaust procedure, SAM, SUM, training; pager, seach engine, Sun /Oracle Case before leaving issues open, if still no resolution and not classified, generate an IR.

This particular issue went from day shift through night shift and back to day shift

Jim Robinson

CMAC Day Staff Principal SME

Phone: 719-474-3660

DSN: 268-3660

Fax: 719-474-3690

Jim.R.obinsQn@afspc.af.mil

721 CS/SCEOMO

1 Norad Rd, Suite 6203

Cheyenne Mtn AFS, CO 80914

1 1/20/2007

CSC 00153 g 398

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